

<h2 style="margin: 0;">Regulatory Analysis Form</h2> <p style="margin: 0;">(Completed by Promulgating Agency)</p> <p style="margin: 0; font-size: small;">(All Comments submitted on this regulation will appear on IRRC's website)</p>	<p style="margin: 0;">INDEPENDENT REGULATORY REVIEW COMMISSION</p> <div style="border: 2px solid black; padding: 5px; width: fit-content; margin: 0 auto;"> <p style="margin: 0; font-size: 2em; font-weight: bold;">RECEIVED</p> <p style="margin: 5px 0 0 0;">JUL - 9 2019</p> <p style="margin: 0; font-size: small;">Independent Regulatory Review Commission</p> </div>
<p>(1) Agency Department of State, Bureau of Professional and Occupational Affairs</p>	<p>IRRC Number: 3220</p>
<p>(2) Agency Number: 16A Identification Number: 060</p>	
<p>(3) PA Code Cite: 49 Pa. Code §§ 43b.101—43b.103 and 43b.201</p>	
<p>(4) Short Title: Expungement; Fees</p>	
<p>(5) Agency Contacts (List Telephone Number and Email Address):</p> <p>Primary Contact: Cynthia K. Montgomery, Deputy Chief Counsel, 2601 North Third Street, P.O. Box 69523, Harrisburg, PA 17106-9523; phone (717) 783-7200; fax (717) 787-0251; cymontgome@pa.gov.</p> <p>Secondary Contact: Jacqueline A. Wolfgang, Regulatory Counsel, 2601 North Third Street, P.O. Box 69523, Harrisburg, PA 17106-9523, phone (717) 783-7200; fax (717) 787-0251; jawolfgang@pa.gov.</p>	
<p>(6) Type of Rulemaking (check applicable box):</p> <p><input type="checkbox"/> Proposed Regulation</p> <p><input checked="" type="checkbox"/> FINAL REGULATION</p> <p><input type="checkbox"/> Final Omitted Regulation</p>	<p><input type="checkbox"/> Emergency Certification Regulation;</p> <p><input type="checkbox"/> Certification by the Governor</p> <p><input type="checkbox"/> Certification by the Attorney General</p>
<p>(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)</p> <p>The rulemaking is needed to effectuate Section 3 of Act 6 of 2018, which amended section 5(a) of the act of July 2, 1993 (P.L. 345, No. 48) (63 P.S. § 2205(a)), to require the Commissioner of Professional and Occupational Affairs to expunge certain disciplinary actions (discipline imposed for a violation involving failure to complete continuing education requirements; and discipline imposed for a violation imposed involving practice for 6 months or less on a lapsed or expired license, registration, certificate or permit) upon application and the payment of all costs associated with expungement as established by the Commissioner by regulation.</p>	
<p>(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.</p> <p>The act of February 15, 2018 (P.L. 14, No. 6) (Act 6 of 2018) amended section 5(a) of the act of July 2, 1993 (P.L. 345, No. 48) (63 P.S. § 2205(a)) to require the Commissioner to expunge certain disciplinary records provided various criteria are met and requires the applicant for expungement to pay all costs associated with expungement “as established by the commissioner by regulation.” In addition, sections 506 and 810(a)(7) of the Administrative Code of 1929 (71 P.S. §§ 186 and 279.1(a)(7)) provide the Department of State and the Commissioner the general authority to prescribe rules and regulations, not inconsistent with law, and to set fees.</p>	

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

To the extent that the regulation establishes a fee to cover the costs associated with expungement, it is mandated by Act 6 of 2018. Otherwise, it is not mandated by any Federal or state law or court order, or Federal regulation.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The regulation is needed to implement the expungement provisions of Act 6 of 2018. It is estimated that at the present time, there are approximately 10,000 disciplinary actions that would be eligible for expungement under Act 6 of 2018, provided that they meet the statutory criteria for expungement, and an additional 500 that would become eligible each year. These estimates are based on the "complaint code" assigned when a disciplinary file is opened. Individuals who have only had one relatively minor disciplinary action during their careers would benefit by the ability to have it expunged from the public records, provided it has been at least 4 years since final disposition, the individual is not the subject of an active investigation or in a current disciplinary status, and has paid all fees, fines, civil penalties and costs associated with the disciplinary record. Licensees have complained about the adverse impact to their professional reputation by having public discipline even for relatively minor infractions. Potential clients and/or employers look up their license status and history and may not engage their services or hire them over something that happened in the distant past that has no bearing on their current ability to practice their profession with reasonable skill and safety to the public health, safety and welfare.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

There are no Federal licensure standards for the professions regulated by licensing boards and commissions under the Bureau of Professional and Occupational Affairs, with the exception of certified real estate appraisers, which must comply with the standards of the Federal Appraiser Qualifications Board (AQB) with regard to Federally-related real estate transactions. Those standards are silent as to expungement of disciplinary matters.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

Generally, expungement is a concept that applies to criminal convictions in most states. Very few states provide for expungement of professional and occupational disciplinary records. Some states provide for expungement of certain administrative disciplinary actions by all licensing boards and commissions; others do not. For example, in Illinois, the Illinois Department of Financial and Professional Regulation permits expungement of a limited class of violations (failure to pay taxes or student loans, failure to meet continuing education requirements, failure to renew a license on time, failure to obtain or renew a certificate of registration or ancillary license, advertising violations or any grounds for discipline that were subsequently removed from the applicable licensing act). The applicant must wait seven years to apply and there is a \$200 non-refundable application fee. South Carolina permits licensing boards to establish procedures to allow a licensee who has been issued a public reprimand to petition the board for expungement of the reprimand from the licensee's record. (See, Title 40 SC Code of Laws 40-1-120(E).)

In some states, expungement may be available on a board-by-board basis. For example, in Kentucky, the State Board of Nursing has expungement authority (KRS 24.131(9)). Pursuant to this authority the Board adopted regulations at 201 KAR 20:410 which permit certain types of disciplinary orders to be expunged upon written application (consent decrees that are at least five years old; agreed orders and decisions that are at least 10 years old that concern failure to complete continuing education, practice on an expired license, or paid fees that were returned unpaid by the bank; agreed orders or decisions that are at least 20 years old if there have been no subsequent disciplinary action and all of the terms of the agreed order or decision have been met). Similarly, the Kentucky Board of Medicine has regulations permitting expungement on a case-by-case basis for minor infractions no sooner than 3 years following completion of any disciplinary sanctions imposed under the action sought to be expunged (See 201 KAR 9:350). The Kentucky Pharmacy Board has established regulations for expungement of lapsed license and continuing education violations as well. (201 KAR 2:270), as has the Kentucky Optometry Board (201 KAR 5:100). However, other Kentucky boards either do not have the statutory authority or have not elected to provide for expungement.

Of the twelve other states in the Northeast region (Ohio, Maryland, Delaware, West Virginia, New Jersey, New York, Massachusetts, Rhode Island, Connecticut, New Hampshire, Vermont and Maine) none appear to have provisions for expungement of disciplinary records. However, Massachusetts removes certain disciplinary actions from a professional's public profile after 10 years, although the sanction remains available on request.

The Commissioner does not believe the proposal will adversely affect the Commonwealth's ability to compete with other states.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No, the regulation will not affect any other regulation of any of the professional or occupational licensing boards, or any other state agency.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

Because the statute requires expungement provided the enumerated criteria are met, the Commissioner did not solicit input from the public prior to publishing the proposed rulemaking. However, over the years, numerous members of the regulated community of licensees have approached the Bureau, the boards and commissions seeking expungement. The Commissioner has already received numerous communications from licensees asking for expungement and indicating a willingness to pay all costs. Upon publication of the proposed rulemaking, the Commissioner received comments from LeadingAge PA, an association of not-for-profit senior services; the Pennsylvania Institute of Certified Public Accountants (PICPA); and Cynthia Reddy, a licensee of the State Board of Nursing. Each of these comments was generally supportive of the proposal. The Commissioner considered these comments, and those of the Independent Regulatory Review Commission in drafting the final-form rulemaking.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

The various licensing boards and commissions license over 1 million individuals in this Commonwealth. However, this rulemaking would only affect those who have a disciplinary record that would be eligible for expungement. It is estimated that approximately 10,000 disciplinary records currently exist that relate to continuing education violations and lapsed license violations that may be eligible for expungement, provided the statutory criteria are met, and an additional 500 that may become eligible each year. These individuals would be impacted by the \$155 fee to apply for expungement of a disciplinary record. However, there could be a positive economic impact once the disciplinary record is expunged, in that licensees have historically complained of collateral consequences arising from these minor disciplinary records, in that employers and potential clients may pass them over simply because they have a disciplinary history, without regard to what the violation is. These licensees argue that minor discipline for continuing education violations and short-term lapsed license practice should not be a permanent "black mark" on an otherwise unblemished professional record causing them needless embarrassment with clients and colleagues that exceeds the purposes of reasonable deterrence.

In that a vast majority of licensees of the professional and occupational licensing boards either are or work for small businesses, the costs and benefits associated with expungement may flow to the business. However, for the most part, businesses (including small businesses) are not affected by this regulation.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

Because applying for expungement is voluntary, no one would be required to comply with the rulemaking. If every eligible licensee takes advantage of the expungement process, up to 10,000 initial individuals would be required to apply and pay the \$155 fee established by the regulation, followed by approximately 500 annually thereafter.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

As noted above, a licensee applying for expungement of a disciplinary record under Act 6 of 2018 would be required to pay the \$155 fee to cover the costs associated with expungement. However, that individual could see positive economic impact because the disciplinary record would no longer be an impediment to employment or potential clients who may not take the time to inquire as to the basis for the discipline. The individual would no longer have a "black mark" on an otherwise unblemished professional record. In addition, licensees would enjoy a positive social impact associated with the alleviation of the stigma and embarrassment that licensees may bear in regard to having a disciplinary history.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

Each licensee would need to conduct a cost/benefit analysis and determine if it is worth it to invest \$155 to clear up a disciplinary record. The only adverse effect of the rulemaking is that the public would no longer be able to discern if a particular licensee had ever been disciplined. However, it is clear that the General Assembly weighed that against the benefits to licensees with only one minor disciplinary record and determined that the harm to the professional reputation to the individual licensee that would be avoided by expungement of the record outweighed the right of the public to be informed of every one of these minor disciplinary violations.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

Considering the fact that applying expungement is voluntary, it is difficult to accurately estimate how many licensees will apply for expungement and incur the \$155 cost associated with compliance. Assuming that 100% of those eligible could apply for expungement, maximum costs of compliance with the rulemaking would be \$1,550,000 initially, with a maximum annual cost of \$77,500 thereafter. However, because many of the potential applicants are either retired from their profession, no longer practice in Pennsylvania, or are simply not concerned by the presence of these minor disciplinary actions on their records, the Bureau based the fee on the assumption that 25% of those eligible would apply for expungement. Given that assumption, the Bureau has estimated initial costs of \$387,500, and an annual cost of \$19,375 thereafter. See the attached Fee Report Form for the calculation resulting in the \$155 fee. Since the passage of Act 6 of 2018, the Bureau has only received a handful of inquiries about having a disciplinary action expunged. However, once this rulemaking is promulgated and more individuals become aware of the availability of expungement, it is possible that more licensees will seek expungement. For this reason, the costs to the regulated community have been expressed in the table in item (23) below as a range from 25% to 100% of eligible licensees.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no costs or savings to local governments associated with this rulemaking.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

All costs to state government associated with implementation of the regulation will be covered by the \$155 fee.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

Because the Bureau anticipates an online process to apply for expungement of an eligible disciplinary record, no legal, accounting, or consulting procedures and no additional reporting, recordkeeping or other paperwork will be required for licensees applying for expungement. All a licensee would need to do is identify the eligible disciplinary record, respond to certain questions and prompts for information, and pay the fee. The Bureau/boards will incur legal costs associated with processing the order of expungement and permanently sealing the records from public access, however, those costs will be recouped through the \$155 expungement fee.

(22a) Are forms required for implementation of the regulation?

There will be an online application process through PALS (the PA Licensing System) within which the licensee would simply need to log into the licensee's profile, identify the disciplinary record for which expungement is sought, respond to certain questions/prompts for information related to the criteria for approval and pay the \$155 fee. Developers have designed the system to produce an application which can be reviewed by the applicant, signed electronically, and submitted to the Commissioner for consideration. This online application process is expected to be deployed to coincide with the publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

(22b) If forms are required for implementation of the regulation, attach copies of the forms here. If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.

Attached is an example of the application form that will be created by the PALS expungement functionality (or a reasonable facsimile thereof). While the application will be created and signed electronically, it would be capable of transfer from storage to a tangible medium, i.e., it may be printed out on paper. The application would then be referred to Legal Office staff to verify that all statutory criteria have been met.

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY 18-19	FY +1 19-20	FY +2 20-21	FY +3 21-22	FY +4 22-23	FY +5 23-24
SAVINGS:						
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:						
Regulated Community	\$0	\$387,500 - \$1,550,000	\$19,375 - \$77,500	\$19,375 - \$77,500	\$19,375 - \$77,500	\$19,375 - \$77,500
Local Government						
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Costs	\$0	\$387,500 - \$1,550,000	\$19,375 - \$77,500	\$19,375 - \$77,500	\$19,375 - \$77,500	\$19,375 - \$77,500

REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(23a) Provide the past three-year expenditure history for programs affected by the regulation.

Program	FY -3 15-16 (Actual)	FY -2 16-17 (Actual)	FY -1 17-18 (Projected)	Current FY 18-19 (Budgeted)
Bureau of Professional and Occupational Affairs	\$49,769,430.10	\$51,961,342.74	\$53,299,817.11	\$61,476,000

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

This rulemaking will not have an adverse impact on small businesses. In fact, based on anecdotal evidence from licensees, it appears that being able to expunge these relatively minor disciplinary actions that are fairly remote in time would have a positive impact on a business, in that the "black mark" on the professional record of the licensee would be eliminated. Assuming that every licensee desiring expungement either is, or works for, a small business, there could be as many as 10,000 small businesses impacted by the regulation. The only cost would be the \$155 application fee if the small business elected to pay the fee for its licensees. The Commissioner could conceive of no less intrusive or less costly alternative method of achieving the purposes of Act 6 of 2018's expungement provisions.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

No special provisions were developed because the Commissioner could discern no groups that needed any particular accommodations.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

No alternative regulatory provisions were considered and rejected. The Commissioner believes this proposal represents the least burdensome acceptable alternative.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

This rulemaking does not adversely impact small business. There are no compliance or reporting requirements for small businesses. There are no schedules or deadlines that need to be modified for small businesses. Only those licensees that elect to apply for expungement of a disciplinary record are impacted by the rulemaking. There are no design or operational standards required by the regulation. It would be inconsistent with Act 6 to exempt a small business from all or any part of the requirements for expungement.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

The only data that serves as the basis for this rulemaking is the data used to calculate the required fee to apply for expungement. See attached Fee Report Form.

(29) Include a schedule for review of the regulation including:

- A. The length of the public comment period: **30 days**
- B. The date or dates on which any public meetings or hearings will be held: **No public meetings or hearings have been held and none are scheduled.**
- C. The expected date of delivery of the final-form regulation: **Summer 2019**
- D. The expected effective date of the final-form regulation: **Upon publication as final.**
- E. The expected date by which compliance with the final-form regulation will be required: **Upon publication as final.**
- F. The expected date by which required permits, licenses or other approvals must be obtained: **N/A**

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The Commissioner continuously evaluates the cost effectiveness of the Bureau's regulations on a fiscal year and biennial basis. The Bureau intends to re-evaluate these regulations a year after the expungement process has been established when the Bureau has more data relating to how many expungement applications are received, and how well the PALS functionality is working.



PENNSYLVANIA BUREAU OF PROFESSIONAL AND
OCCUPATIONAL AFFAIRS
2601 NORTH THIRD STREET
P.O. BOX 2649
HARRISBURG, PA 17105-2649

PHONE: (717) 787-8503
www.dos.pa.gov

FAX: (717) 787-7769

ACT 6 OF 2018 – APPLICATION FOR EXPUNGEMENT

Complete the following form, attach documentation in support of the request for expungement. A \$155 application fee is required.

NAME: _____
(LAST) (FIRST) (MIDDLE)

ADDRESS: _____
(NUMBER & STREET) (CITY) (STATE) (ZIPCODE)

LICENSE NUMBER: _____ DATE OF BIRTH: _____
(MM/DD/YYYY)

NAME OF LICENSING BOARD: _____

NAME OF LICENSED PROFESSION: _____

DISCIPLINARY FILE/CASE/DOCKET NO. _____

CERTIFICATION STATEMENT: I certify that I am applying for expungement of the above-referenced disciplinary record and in support thereof aver as follows (check each appropriate statement):

- It has been at least 4 years from the final disposition of the disciplinary record.
- The disciplinary record is related to discipline imposed for a violation involving:
 - Failure to complete continuing education requirements.
 - Practicing for 6 months or less on a lapsed or expired license, registration, certificate or permit.
- The disciplinary record is my only disciplinary record with a licensing board or commission under the Commissioner's jurisdiction.
- I am not, to the best of my knowledge, information and belief, the subject of an active investigation related to professional or occupational conduct.
- My license is not in a current disciplinary status, such as revoked, suspended or on probation.
- All fees or fines, including civil penalties and costs imposed in a disciplinary proceeding, have been paid in full.
- I have not had a disciplinary record previously expunged by the Commissioner.

VERIFICATION

I verify that the statements in this application are true and correct to the best of my knowledge, information and belief. I understand that any false statements made are subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsifications to authorities) and may result in disciplinary proceedings affecting my license. I verify that this form is in the original format as supplied by the Department of State and has not been altered or otherwise modified in any way. I am aware of the criminal penalties for tampering with public records or information pursuant to 18 Pa.C.S. § 4911 (relating to tampering with public records or information).

Signature of Applicant

Date

Printed Name of Applicant

FEE REPORT FORM

Agency: State - BPOA

Date: June 18, 2018

Contact: Ian Harlow, Commissioner
Bureau of Professional & Occupational Affairs

Phone No. 783-7194

Fee Title, Rate and Estimated Collections:

Application for Expungement for Continuing Education violations and lapsed license violations: \$155.00

Estimated initial revenue: \$ 387,500 (2500 applications x \$155.00)

Estimated annual revenue: \$ 19,375 (125 applications x \$155.00)

Fee Description:

The fee will be charged to every licensee who applies for expungement under the Act of February 15, 2018 (P.L. 14, No. 6) (Act 6 of 2018) for violations related to the imposition of discipline involving failure to complete continuing education requirements or practicing for 6 months or less on a lapsed license, registration, certificate or permit.

Fee Objective:

The fee should (1) offset the identifiable costs incurred by the Bureau and its licensing boards and commissions to process an application for expungement and (2) defray a portion of the Board's administrative overhead.

Fee-Related Activities and Costs:

Paralegal review	(1hr)	\$57.72
Administrator Officer review	(.25hr)	\$14.43
Legal Assistant review	(.25hr)	\$11.69
Board Counsel review	(.5hr)	\$47.76
Transaction fee		\$3.67
Administrative Overhead:		\$15.00
	Total Estimated Cost:	\$150.27
	Proposed Fee:	\$155.00

Analysis, Comment, and Recommendation:

It is recommended that a fee of \$155.00 be established for processing an application for expungement.

Board/Bureau staff –Online applications will be directed to the Legal Office through the PALS licensing system.

Legal Office staff – Paralegal will receive and review all applications for expungement. Paralegal reviews the application to assure all Act 6 criteria are met. If not, paralegal drafts order denying the expungement with prejudice or without prejudice to apply again when all criteria are met (depending on the reason for the denial). If all criteria are met, Paralegal reopens disciplinary file. Administrative Officer orders archived (physical) files from State Archives. Paralegal prepares order granting expungement and sealing the disciplinary record. Board Counsel reviews complete file and approves/disapproves the expungement order for issuance. Legal Assistant obtains the Commissioner's approval/signature on all orders granting or denying expungement, files the order with the Prothonotary, distributes it per "distribution list" and mails it to the applicant. For orders granting expungement, Administrative Officer seals the physical files and returns them to the State Archives. Counsel "tracker" closes the case file in the PALS case management system and updates the licensee's disciplinary record in PALS to seal the disciplinary record from public access.

CDL-1

**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU**

(Pursuant to Commonwealth Documents Law)



DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality. Attorney General

BY: _____
(DEPUTY ATTORNEY GENERAL)

DATE OF APPROVAL

Check if applicable
Copy not approved. Objections
attached.

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

Bureau of Professional and Occupational Affairs
(AGENCY)

DOCUMENT/FISCAL NOTE NO. 16A-060

DATE OF ADOPTION: _____

BY: K. Kalonji Johnson
K. Kalonji Johnson

TITLE: Acting Commissioner of Professional and Occupational Affairs

Copy below is hereby approved as to form and legality. Executive or Independent Agencies.

BY: Marisa H. Z. Leh
(Deputy General Counsel)
(~~Chief Counsel, Independent Agency~~)
(Strike inapplicable title)

JUN 14 2019

DATE OF APPROVAL

Check if applicable. No Attorney General approval or objection within 30 days after submission.

FINAL RULEMAKING

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS**

49 PA. CODE §§ 43b.101—43b.103 and 43b.201

EXPUNGEMENT; FEES

The Acting Commissioner of Professional and Occupational Affairs (Commissioner) hereby amends 49 Pa. Code, Chapter 43b, by adding Subchapters B and C (relating to expungement; and fees) to read as set forth in Annex A.

Effective Date

The amendments will be effective upon publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

Statutory Authority

The act of February 15, 2018 (P.L. 14, No. 6) (Act 6 of 2018) amended section 5(a) of the act of July 3, 1993 (P.L. 345, No. 48) (63 P.S. § 2205(a)) to provide the authority to the Commissioner to expunge certain disciplinary records, provided various criteria are met and requires the applicant for expungement to pay all costs associated with expungement “as established by the commissioner by regulation.” In addition, sections 506 and 810(a)(7) of the Administrative Code of 1929 (71 P.S. §§ 186 and 279.1(a)(7)) provide the Department of State and the Commissioner the general authority to prescribe rules and regulations, not inconsistent with law, and to set fees. This rulemaking effectuates Act 6 of 2018.

Purpose and Explanation

The rulemaking is needed to effectuate Act 6 of 2018, which requires the Commissioner to expunge certain disciplinary actions upon application and the payment of all costs associated with expungement “as established by the commissioner by regulation.” The final-form rulemaking adds two new subchapters to Chapter 43b (relating to Commissioner of Professional and Occupational Affairs). The existing language in Chapter 43b relating to “Schedule of civil penalties; guidelines for imposition of civil penalties and procedures for appeal” is now set forth in Subchapter A. Subchapter B sets forth the requirements to apply for and obtain expungement of disciplinary records in accordance with Act 6 of 2018. Subchapter C (relating to fees) sets forth a fee of \$155 for the expungement of a disciplinary record. This fee is based on an evaluation of the costs associated with processing expungement applications by the Bureau’s legal office staff, including administrative overhead. Rather than include the fee in Subchapter B, the Commissioner elected to establish a separate subchapter relating to fees to provide for the possibility of future fees being promulgated under the Commissioner’s general authority to “fix the fees to be charged by the several professional and occupational examining boards within the department” as set forth in section 810 of the Administrative Code of 1929 (63 P.S. § 279.1).

The Commissioner published proposed rulemaking at 48 Pa.B. 7120 (November 10, 2018), for thirty days of public comment. During the public comment period, the Commissioner received comments from LeadingAge PA, an association of not-for-profit senior services; the Pennsylvania Institute of Certified Public Accountants (PICPA); and Cynthia Reddy, a licensee of the State Board of Nursing. Each of these comments was generally supportive of the proposed rulemaking. On January 9, 2019, the Commissioner received comments from the Independent Regulatory Review Commission (IRRC).

Summary of Comments and the Commissioner's Response

LeadingAge PA, a trade association representing more than 320 not-for-profit providers of senior housing, health care and community services across the Commonwealth wrote in support of the proposed regulation, noting that it would provide a second chance for a licensee who has otherwise complied with all licensure requirements, but has made a one-time error with their licensure renewal or continuing education credits. PICPA found the proposed regulations to be consistent with the statutory provisions and offered no objections to the proposal.

Likewise, Cynthia Reddy commented that “this regulation is a good move since there are plenty of people that have had their employment affect [sic] by small infractions.” However, she questioned the calculation of the proposed fee for expungement of a disciplinary record. Specifically, she asked for a breakdown in the overhead charges and lamented that the agency has not made adequate use of technology. As noted in the proposed preamble, individuals will be able to apply for expungement through their “dashboard” in the Pennsylvania Licensing System (PALS). The Commissioner is very interested in leveraging technology to increase efficiency and lower costs. As Ms. Reddy notes, it is more cost effective to process applications for expungement electronically, rather than “paying government employees to scan paper.” The new process will allow licensees who have eligible disciplinary records to apply online for expungement, in much the same way as they currently apply for an initial license. Regarding Ms. Reddy’s request for a breakdown of the overhead charges, generally overhead includes costs incurred that are not attributable to a specific task, for example rent, utilities, insurance, and costs associated with various supporting functions such as information technology costs. Part of the overhead charges specific to this fee are the costs associated with development of the expungement functionality through PALS and ongoing information technology support. Ms. Reddy also asks why the Commissioner chose to “round up” to \$155 based on the calculation of current costs to process an expungement application of \$150.27. The Bureau’s Revenue Office conducted a cost analysis based on estimated costs as of August 27, 2018. Given the passage of time since the original calculation, the Commissioner elected to impose a fee of \$155 to cover all costs as required by Act 6 of 2018, as well as anticipated increases over the next few years. When the fee is insufficient to cover the costs associated with processing an application for expungement, the Commissioner will reassess the fee and promulgate a new fee by regulation.

IRRC submitted two comments. The first relates to the definition of “expunge or expungement.” IRRC aptly pointed out that the Commissioner modified the definition slightly in the proposed rulemaking. This modification was made to simplify the language of the act to be more understandable by the regulated community without changing the meaning of the term. Individuals with disciplinary records are concerned about the ability to represent that they have no disciplinary record after an expungement. However, in light of IRRC’s comment, the Commissioner has revised the final-form rulemaking to parrot the statutory definition in its entirety.

Next, IRRC asks how an online application process for expungement is consistent with the statute that explicitly requires a licensee, registrant, certificate holder or permit holder to “make written application” to the commissioner. In response, the Commissioner believes that the requirement for a written application is meant to distinguish between oral communications versus

written communications, and not the medium in which the written material is transcribed and stored (paper versus electronic). The Commissioner notes that an application created through an online process is no less a “writing” than one in which an applicant puts pen to paper. The PALS system generates the “application” based on the applicant’s response to various questions and prompts for information. Once complete, the applicant can review the application, “sign” the application electronically, and submit it to the Commissioner for consideration. The completed application is capable of transfer from storage to a tangible medium. That is, it can be printed out on paper. The Commissioner believes that the General Assembly could not have intended to impede technological solutions and efficiencies in the expungement process by the use of its terminology requiring a written application for expungement. The Commissioner also believes the acceptance of online applications to be submitted in the manner and format prescribed by the Commissioner is consistent with section 502 of Pennsylvania’s Electronic Transactions Act (73 P.S. § 2260.502) which provides that “[e]ach governmental agency in this Commonwealth shall determine whether and the extent to which it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use and rely upon electronic records and electronic signatures” and to “specify...[t]he manner and format in which the electronic records must be created, generated, sent, communicated, received and stored and the systems established for those purposes.” For this reason, the Commissioner amended § 43b.103(a) to provide that a licensee may apply for expungement in the “manner and format” prescribed by the Commissioner, to be consistent with the authority provided under the Electronic Transactions Act.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The costs to the Bureau and its licensing boards and commissions related to processing applications for expungement will be recouped through fees paid by applicants. Licensees, registrants, certificate holders and permit holders who apply for expungement of disciplinary records will be impacted by the \$155 application fee. Because the PALS licensing system will include an online process to apply for expungement of an applicable disciplinary record, there should be minimal paperwork requirements for applicants.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on Thursday, October 25, 2018, the Commissioner submitted a copy of the notice of proposed rulemaking, published at 48 Pa.B. 7120, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) and the House Professional Licensure Committee (HPLC) for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Commissioner has considered all comments from IRRC and the public. The Commissioner received no comments from the HPLC or the SCP/PLC.

On July 9, 2019, the Commissioner delivered this final-form rulemaking to IRRC, the HPLC and the SCP/PLC. Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on _____, 2019, the final-form rulemaking was deemed approved by the HPLC and the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____, 2019, and approved the final-form rulemaking.

Additional Information

Individuals who need information about the final-form regulation may contact the Bureau of Professional and Occupational Affairs, at P.O. Box 2649, Harrisburg, PA 17105-2649, RA-BPOA@pa.gov.

Findings

The Commissioner finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) The amendments to this final-form rulemaking do not enlarge the original purpose of the proposed regulation published at 48 Pa.B. 7120 (November 10, 2018).
- (4) This final-form rulemaking is necessary and appropriate for the administration of the act of February 15, 2018 (P.L. 14, No. 6).

Order

The Commissioner, therefore, orders that:

- (a) The regulations of the Commissioner at 49 Pa.Code Chapter 43b are amended to read as set forth in Annex A.
- (b) The Commissioner shall submit this Order and Annex A to the Office of Attorney General and the Office of General Counsel for approval as required by law.
- (c) The Commissioner shall submit this order and Annex A to IRRC, the HPLC and the SCP/PLC as required by law.
- (d) The Commissioner shall certify this Order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

- (e) This final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

K. Kalonji Johnson
Acting Commissioner of Professional
and Occupational Affairs

ANNEX A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 43b. COMMISSIONER OF PROFESSIONAL AND OCCUPATIONAL
AFFAIRS

SUBCHAPTER A. SCHEDULE OF CIVIL PENALTIES, GUIDELINES FOR
IMPOSITION OF CIVIL PENALTIES AND PROCEDURES FOR APPEAL

* * * * *

SUBCHAPTER B. EXPUNGEMENT

§ 43b.101. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicated otherwise:

Expunge or expungement—Removal of a disciplinary record from a licensee’s record accomplished by (1) permanently sealing the affected record from public access; (2) deeming the disciplinary proceedings to which the affected record refers as not having occurred; and (3) except with respect to any subsequent application for expungement, affording the licensee the right to represent that no disciplinary record exists regarding the SUBJECT matter OF THE AFFECTED RECORD.

Licensee—Any person holding a license, registration, certificate or permit issued by a licensing board or commission under the Bureau.

§ 43b.102. Expungement of disciplinary records.

(a) *Eligibility.* The following disciplinary records are eligible for expungement:

- (1) Discipline imposed for a violation involving failure to complete continuing education requirements.
- (2) Discipline imposed for a violation involving practicing for 6 months or less on a lapsed or expired license, registration, certificate or permit.
- (b) Prohibition. The Commissioner will not expunge disciplinary records for any violation other than those listed in subsection (a).
- (c) Criteria for expungement of an eligible disciplinary record. The Commissioner will expunge an eligible disciplinary record if the following criteria are met:
- (1) The disciplinary record must be the licensee's only disciplinary record with a licensing board or commission under the Commissioner's jurisdiction.
- (2) The licensee may not be the subject of an active investigation related to professional or occupational conduct.
- (3) The licensee may not be in a current disciplinary status, such as revoked, suspended or on probation.
- (4) Any fees or fines, including civil penalties and costs imposed in a disciplinary proceeding, assessed against the licensee must be paid in full.
- (5) The licensee may not have had a disciplinary record previously expunged by the Commissioner.

§ 43b.103. Application for expungement.

- (a) A licensee may apply for expungement in accordance with this subchapter in the manner AND FORMAT prescribed by the Commissioner.
- (b) A licensee may apply for expungement not earlier than 4 years from the final disposition of the disciplinary record.

(c) A licensee applying for expungement shall pay the fee set forth in § 43b.201 (relating to fees) for expungement of a disciplinary record.

SUBCHAPTER C. FEES

§ 43b.201. Fees for services.

The following fees are charged for services provided by the Commissioner/Bureau:

Expungement of a disciplinary record..... \$ 155

* * * * *

16A-060 LIST OF PUBLIC COMMENTERS

Beth Greenberg
Sr. Director of Regulatory Affairs
LeadingAge PA
1100 Bent Creek Boulevard
Mechanicsburg, PA 17050
bgreenberg@leadingagepa.org
717.763.5724

Peter N. Calcara, CAE,
Vice President – Government Relations
Pennsylvania Institute of CPAs
500 North 3rd Street, Suite 600A
Harrisburg, PA 17101
PCalcara@picpa.org
717.232.1821

Cynthia Reddy
cynredss@gmail.com



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
Post Office Box 2649
Harrisburg, Pennsylvania 17105-2649
(717) 783-7200

July 9, 2019

The Honorable George D. Bedwick, Chairman
INDEPENDENT REGULATORY REVIEW COMMISSION
14th Floor, Harristown 2, 333 Market Street
Harrisburg, Pennsylvania 17101

Re: Final Regulation
Bureau of Professional and Occupational Affairs
16A-060: Expungement; Fees

Dear Chairman Bedwick:

Enclosed is a copy of a final rulemaking package of the Acting Commissioner of Professional and Occupational Affairs pertaining to expungement and fees.

The Acting Commissioner will be pleased to provide whatever information the Commission may require during the course of its review of the rulemaking.

Sincerely,

A handwritten signature in black ink that reads "K. Kalonji Johnson".

K. Kalonji Johnson
Acting Commissioner of
Professional and Occupational Affairs

CKM:bmz

Enclosure

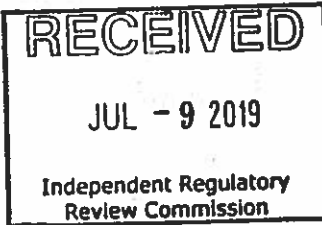
cc: Cynthia Montgomery, Deputy Chief Counsel
Department of State

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 16A-060
SUBJECT: Expungement; Fees
AGENCY: DEPARTMENT OF STATE
 Bureau of Professional and Occupational Affairs

TYPE OF REGULATION

- Proposed Regulation
- Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Disapproved Regulation
 - a. With Revisions
 - b. Without Revisions



FILING OF REGULATION

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
		<i>HOUSE COMMITTEE ON PROFESSIONAL LICENSURE</i>
7/9/19	<u>Cathy O'Donnell</u>	MAJORITY CHAIR <u>Rep. David Hinkernell</u>
7/9/19	<u>Jason Finga</u>	MINORITY CHAIR <u>Rep. Harry A. Readshaw</u>
		<i>SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE</i>
7/9/19	<u>Larry M. Blouck</u>	MAJORITY CHAIR <u>Sen. Robert M. Tomlinson</u>
7/9/19	<u>Jennifer Keen</u>	MINORITY CHAIR <u>Sen. Lisa M. Boscola</u>
7/9/19	<u>K Cooper</u>	<i>INDEPENDENT REGULATORY REVIEW COMMISSION</i>
_____	_____	<i>ATTORNEY GENERAL (for Final Omitted only)</i>
_____	_____	<i>LEGISLATIVE REFERENCE BUREAU (for Proposed only)</i>