

**INDEPENDENT REGULATORY REVIEW COMMISSION
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held June 17, 2021

George D. Bedwick, Chairman
John F. Mizner, Esq., Vice Chairman
John J. Soroko, Esq.
Murray Ufberg, Esq.
Dennis A. Watson, Esq., dissenting

Order Issued July 8, 2021
Regulation No. 16A-7103 (#3273)
Bureau of Professional and Occupational
Affairs
Schedule of Civil Penalties - Crane Operators

On October 8, 2020, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the Bureau of Professional and Occupational Affairs (Bureau). This rulemaking amends 49 Pa. Code § 43b.28. The proposed regulation was published in the October 24, 2020 *Pennsylvania Bulletin* with a public comment period ending on November 30, 2020. The final-form regulation was submitted to the Commission on April 26, 2021.

This regulation adopts a schedule of civil penalties for various violations of the Crane Operator Licensure Act (act) (63 P.S. §§ 2400.101- 2400.2102). The Commissioner of Professional and Occupational Affairs (Commissioner), in consultation with the State Board of Crane Operators (Board) states the purpose of this regulation is to deter violations of the statutory and regulatory requirements contained in the proposed schedule of civil penalties. It is also intended to streamline the disciplinary process to be more efficient and cost effective.

We find that this regulation does not meet the criteria of clarity and the protection of the public health, safety and welfare. 71 P.S. § § 745.5b(b)(2) and (3). As explained below, there are two issues that we believe should be clarified and or revised for the protection of the public health, safety and welfare.

First, in the Preamble to the proposed regulation, the Commissioner and the Board state that “[o]perating a crane without a license is a serious infraction of both section 501(a) of the act (63 P.S. § 2400.501(a)) and the Board’s regulation at § 6.41(a) (relating to unlicensed crane operation). [49 Pa. Code § 6.41(a)] An unlicensed individual who has not been properly trained to operate a crane could cause extensive damage to property as well as cause bodily harm to individuals at a construction site.”

In our comments, we asked the Commissioner and the Board whether they considered qualifying the use of the Act 48 civil penalty section for offenses of operating a crane without a license or employing an unlicensed individual to operate a crane. We questioned whether an Act 48 civil penalty should even be available for consideration if the offenses mentioned result in

bodily harm or substantial property damage. See Section 5(a) of the act of July 2, 1993 (P.L. 345, No. 48), 63 Pa. C.S. § 3108(a).

The Commissioner and the Board responded that the ability for agents of the Bureau to file a citation for violations of these sections does not foreclose the possibility of the filing of formal action if the facts and circumstances warrant a more serious penalty. The Commissioner and Board state that the option of issuance of a citation for these types of violations is discretionary, and should be used in those situations where the violation occurs without aggravating circumstances such as bodily injury or property damage. While the Commissioner and Board seem to be in agreement with limiting the citation process to those offenses that do not involve bodily injury or substantial property damage, the final-form regulation was not amended in this regard. We believe the Board should amend the rulemaking to make clear that the citation process is available only for offenses not involving bodily harm or substantial property damage.

Second, a license to operate a crane is valid only in conjunction with certification if the licensee maintains a current certification in the specialty for which the crane operator is certified. 63 P.S. § 2400.501(f) and 49 Pa. Code § 6.12(a). Under the act and Board's regulations, a licensee who has failed to maintain certification or submit evidence of re-certification is subject to disciplinary action. 63 P.S. § 2400.502(b) and 49 Pa. Code § 6.32(a)(2). Since certification is integral to licensure, we asked the Board if it considered and rejected establishing an Act 48 civil penalty for failure to maintain certification or provide evidence of certification renewal.

The Commissioner and the Board responded that they did not include the failure to maintain certification or submit evidence of recertification in the schedule of civil penalties because a licensee may choose not to recertify or maintain their certification for several reasons such as being no longer employed, no longer practicing in the profession, or the operator has retired. In these type of situations, the Board explains that "rather than going through the expense of recertification when a licensee is no longer practicing the profession, the licensee may let their certification expire and not engage in the practice of the profession, even though they have a **valid, current license to do so until it subsequently expires**. The Commissioner and the Board believe that the ability to discipline a licensee for failure to maintain certification does not arise until the licensee actually operates a crane after the crane operator's certification has expired. As such, a violation of 63 P.S. §§ 2400.502(b) and 6.32(a)(2) would more appropriately be the **subject of formal disciplinary action**." [Emphasis added.] The Commissioner and the Board's position is completely contrary to the statutory mandate contained in 63 PS Section 2400.502(b) which explicitly states "Failure to maintain certification or submit evidence of renewal of certification shall subject the licensee to disciplinary action." The statute is clear that failure to maintain certification is an offense in and of itself.

The act and the Board's regulations require the application form for renewal of license to indicate when the certification expires. Licensees are required to submit evidence of certification renewal before their current certification expires. 63 P.S. § 200.504(a) and 49 Pa Code § 6.32(a)(2). If the Board does not receive the necessary documentation from a licensee indicating that their certification has been renewed, does it notify the licensee that their license is no longer valid and of the penalty if they operate a crane without a current certification? Has the Board considered mandating that licenses for which the Board has not received proof of recertification be returned to the Board?

Our specific concern is that crane operators with expired certifications but “valid, current licenses” will only be held to account when there is an incident investigation or a complaint filed. Failure to maintain certification or to submit evidence of renewal of certification before the expiration date of certification is a violation of the standards of conduct of a crane operator. 49 Pa Code § 6.44(b)(5). As such, we question why it is necessary to wait until the licensee actually operates a crane before imposing discipline.

The current regulations were promulgated to “[p]rotect people from bodily harm by establishing standards of conduct applied to crane operators in order to restrict or remove from the occupation of crane operation those persons proved to have engaged in conduct, habits, behavior or judgment that has caused bodily harm or is reasonably likely to create an unreasonable risk of harm in the future.” 49 Pa Code § 6.1(b)(2). Given the unique hazards and risk of harm arising from crane operation, we question whether the Board’s approach adequately protects the public from operator error or improper operation of a crane, conveys to the regulated community the seriousness of noncompliance and deters future violations.

We have determined this regulation is consistent with the statutory authority of the Bureau (63 Pa. C.S. § 3108(a)) and the intention of the General Assembly. However, after considering all of the other criteria of the Regulatory Review Act discussed above, we find promulgation of this regulation is not in the public interest.

BY ORDER OF THE COMMISSION:

This regulation is disapproved.



A handwritten signature in black ink that reads "George D. Bedwick".

George D. Bedwick, Chairman