

Comments of the Independent Regulatory Review Commission



Bureau of Professional and Occupational Affairs Regulation #16A-66 (IRRC #3361)

Consideration of Criminal Convictions

January 18, 2023

We submit for your consideration the following comments on the proposed rulemaking published in the November 19, 2022 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (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.

1. Legislative intent; Clarity; Reasonableness.

Act 53 of 2020 (Act 53) (63 Pa.C.S. §§ 3112—3118) set forth a new paradigm for the Bureau's various professional and occupational licensing boards and commissions in considering the impact of criminal convictions on a board or commission's decision whether to refuse to issue or renew, suspend, revoke, or otherwise limit a license, certificate, registration, or permit. This proposed regulation is the Bureau's enactment of the provisions and requirements of Act 53. The Bureau states,

This proposed rulemaking is intended to provide transparency to applicants with criminal histories relating to the types of crimes that may be an impediment to licensure and the factors that the boards and commissions will consider in determining whether an applicant with a criminal conviction may be granted a license. This proposed rulemaking accomplishes these ends by promulgating schedules of criminal convictions that may constitute grounds to refuse to issue, suspend or revoke a license, certificate, registration or permit for each of the 29 professional and occupational licensing boards/commissions as required under 63 Pa.C.S. § 3117. As required under 63 Pa.C.S. § 3117, the Acting Commissioner [of Professional and Occupational Affairs (Commissioner)] consulted with each of the professional and occupational licensing boards, as well as representatives of the business community with knowledge of the respective professions and occupations in developing these schedules.

In determining whether a proposed, final-form, final-omitted, or existing regulation is in the public interest, the Independent Regulatory Review Commission (IRRC) shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation

and whether the regulation conforms to the intent of the General Assembly in the enactment of the statute upon which the regulation is based. In making its determination, IRRC shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General. 71.P.S. § 745.5b.

Representatives Sheryl Delozier and Jordan Harris and Senators John DiSanto and Judith Schwank, prime sponsors of the legislation that ultimately was enacted as Act 53, more commonly known as "occupational licensing reform," submitted comments raising concerns about the proposed regulation. The legislators state that they believe that the Bureau and its boards and commissions have misconstrued the intent of Act 53. The legislators write,

The general theme of Act 53 was that applicants can be presumed unfit only for convictions that are directly related to the practice of the profession in which they seek to practice. The boards and commissions that operate under the umbrella of the [Bureau] were charged with determining what offenses are "directly related" to their practice areas.

But the lists of "directly related" offenses proposed by the licensing boards and commissions are overly broad and are in direct contrast to the spirit of this legislation and the intentions of its makers. For example, the Barber Board's list includes convictions for the possession of a controlled substance with the intent to deliver and felony DUI. Unequivocally, these offenses were not what the General Assembly envisioned as being "directly related" to the profession of barbering when approving this language. Indeed, it compels one to suspend all logic and sense to understand the reasoning underlying the inclusion of these offenses, knowing that such convictions result in the presumption that the applicant poses a "substantial risk" if licensed.

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In other examples, the Board of Nursing has listed as "directly related" 92 separate offenses beyond violent, sexual, and drug trafficking offenses. Many of the boards include garden[-]variety drug offenses on their lists, seemingly for only a general feeling that drugs are bad.

Moreover, none of the lists contain time limits on how long an offense is "directly related." As a result, anyone who ever in their lives was convicted of a listed offense is presumed unfit, no matter how many years have passed. These lifetime bans look remarkably similar to the prior law that we replaced with Act 53, which permitted exclusion of people with felony convictions for their entire lives. A regulatory package that creates lists of lifetime bans is not consistent with the intent of Act 53, which was to open the licensed professions to people with criminal records if they are fit to do the work and do not pose a heightened risk.

The regulatory package frequently discusses "transparency" as if it were the goal that drove Act 53. While transparency was certainly a goal of the legislation, the

primary objectives, as we have said, were to open the professions more widely to rehabilitated people with old and unrelated criminal records and to provide relief to businesses struggling to find qualified workers.

We urge the Department [of State] to thoroughly review and revise with the boards and commissions the “directly related” lists before resubmission of the package to [IRRC], based upon the intent of the law.

Commenters agree with and echo concerns raised by the legislators. Commenters state that the proposed regulation includes directly related lists of criminal offenses which are generally overbroad and include no time limits for consideration of offenses. Commenters emphasize the concern that the regulations effectively create lifetime bans on pursuing certain occupations if the individual was convicted of one of the listed crimes at some point – even decades in the past. The co-sponsorship memo from Senators DiSanto and Schwank states that the legislation “will remove unnecessary barriers to employment and entrepreneurship” by requiring occupational licensure boards and commissions to consider, among other factors, “the amount of time that has passed since conviction.” Further, Sen. DiSanto remarked on the Senate floor that the legislation overhauls the State’s “restrictive occupational licensure laws that deny many qualified residents the right to work because of an old or irrelevant criminal record.”

Commenters raise additional concerns that although the presumption of unfitness may be overcome in an individualized assessment which is provided for in Section 43b.404 (relating to consideration of criminal convictions), the individualized assessment does not occur until after completion of training. One commenter notes that “[f]ew people will be able to devote the time and resources to a training program for a profession knowing that they face such a presumption at the end. In this way, the proposed regulations frustrate the purpose of Act 53 by deterring and excluding low-risk people with criminal convictions.”

The Bureau addresses the concept of placing time limits in the proposed schedules in response to Regulatory Analysis Form (RAF) Question #26 relating to alternative regulatory provisions. The Bureau explains that the definition of “directly relates” in Act 53 is not time-bound, nor has the General Assembly placed time limits on which crimes or categories of crimes may be considered by boards/commissions in making licensure determinations. Citing the definition of “directly relates” as taken from Act 53, the Bureau states in the RAF that a crime directly relates to a particular profession or occupation where “[t]he nature of the criminal conduct for which the person was convicted has a direct bearing on the fitness or ability to perform one or more of the duties or responsibilities necessarily related to the profession, trade or occupation for which the individual seeks licensure.” Thus, the Bureau explains, it is the nature of the criminal conduct that dictates whether a crime directly relates to a profession, and not when the crime occurred. The Bureau states that it believes that the inclusion of time limits would be inconsistent with the legislative intent of Act 53 and amounts to a basic policy decision that is best left to the General Assembly. The Bureau concludes its response by stating that the Commissioner and the boards/commissions believe that the proposed regulation represents the least restrictive, acceptable alternative consistent with the legislative intent of Act 53.

Section 2(a) of the RRA, pertaining to legislative intent, provides the following direction: “To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among [IRRC], the standing committees, interested parties and the agency.” 71 P.S. § 745.2(a). As it prepares the final-form regulation, we ask the Bureau to consult the legislature to clarify the legislative intent of Act 53 and to engage stakeholders to reach consensus where possible. Additionally, we ask the Bureau to explain in the Preamble how the final-form regulation is reasonable and consistent with the General Assembly’s intent.

2. Protection of the public health, safety, and welfare; Reasonableness.

The Bureau proposes a schedule of criminal convictions that may constitute ground to refuse to issue, suspend, or revoke a license, certificate, registration, or permit for each of the 29 professional and occupational licensing boards and commissions in proposed Sections 43b.423—43b.451. The Bureau states, “Each schedule indicates which offenses are those that the applicable licensing board or commission deems as directly related to the occupations or professions regulated by that board or commission, that is, those offenses where the nature of the criminal conduct for which the person was convicted has a direct bearing on the fitness or ability to perform one or more of the duties or responsibilities necessarily related to the profession or occupation for which the individual seeks a license, registration, certificate, or permit.”

The PA Chiropractic Association (Association) opposes the proposed regulation as relates to doctors of chiropractic, stating that there are at least 27 crimes and offenses considered to be directly related to the chiropractic profession that are not considered to be directly related to the medical profession. Conversely, the Association points out that there are at least 15 crimes and offenses considered to be directly related to the medical profession that are not considered to be directly related to the chiropractic profession.

Similarly, several nursing associations raise concerns over inconsistency among health care professionals, noting that there are over 90 crimes on the list of directly related offenses under the Board of Nursing, whereas the Medical Board’s list has 34 crimes. One association points out that theft-related crimes of all grades, DUI, possession of a small amount of marijuana, and lower-level crimes like simple assault are included as directly related to Registered Nurses (inclusive of Nurse Practitioners) and Licensed Practical Nurses, but not included as directly related to Physician’s Assistants or Physicians.

Commenters assert that crimes that are designated as directly related should be uniform across all health care professions and occupations except where the listed offenses are specific to the scope of practice. Did the health care licensing boards consult with one another in determining which offenses to include in their schedules? We ask the Bureau to explain the reasonableness of and any impact on the public health, safety, and welfare of inconsistency among the schedules of health care professionals.

3. Section 43b.201. Fees for services. – Clarity

This section establishes a fee for a preliminary determination application. While the Bureau addresses the process for qualifying for a waiver of the fee in the Preamble, the proposed regulation itself is silent on the existence of a waiver and the process for obtaining one. We ask the Bureau to add language to this section in the final regulation clarifying the availability of and process for seeking a waiver of the fee for a preliminary determination application.

4. Section 43b.404. Consideration of criminal convictions. – Clarity.

The Pennsylvania Society of Health-System Pharmacists requests clarification relating to drug trafficking offenses, stating that Subparagraph (d)(2)(ix) also should pertain to pharmacy interns and their registration process. We ask the Bureau to include pharmacy interns in this provision in the final regulation.

5. Schedules of criminal convictions. – Reasonableness.

Related to Section 43b.423 (relating to schedule of criminal convictions—State Board of Accountancy), the Pennsylvania Institute of Certified Public Accountants (PICPA) provides a list of other crimes, such as theft of trade secrets and mail fraud, which PICPA believes directly relate to the duties necessary to ensure the public's trust and confidence in the profession. PICPA asserts that these convictions should be added to the final regulation. We ask the Bureau to amend the final regulation to include the directly related convictions or explain in the Preamble to the final regulation the reasonableness of excluding them.

Based on the insights provided by this commenter, we ask the Bureau to consider whether additional offenses specific to other boards/commissions were omitted. A thorough reevaluation of all offenses and practices is therefore encouraged to ensure that the final list is appropriate, reasonable, and neither overly-broad nor under-inclusive.