

# RULES AND REGULATIONS

## Title 17—CONSERVATION AND NATURAL RESOURCES

### DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

[17 PA. CODE CH. 23]

#### State Forest Picnic Areas

The Department of Conservation and Natural Resources (Department), Bureau of Forestry, adopts amendments to Chapter 23 (relating to State forest picnic areas). This chapter has not been revised since it was promulgated in 1979. The amendments improve the protection of State forest resources and safety of visitors.

The amendments also eliminate provisions in Chapter 23 that duplicate provisions in Chapter 21 (relating to general provisions) or that would more appropriately be in the form of camping permit conditions.

#### A. *Effective Date*

This final-form rulemaking will go into effect upon publication in the *Pennsylvania Bulletin*.

#### B. *Contact Person*

For further information, contact William R. Slippey, Chief, Recreation Section, Operations and Recreation Division, Bureau of Forestry, DCNR, P.O. Box 8552, Harrisburg, PA 17105-8552; (717) 783-7941; fax (717) 783-5109; or [forestrecreation@state.pa.us](mailto:forestrecreation@state.pa.us).

Persons with disabilities may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users).

This final-form rulemaking is available electronically through the Department's website at [www.dcnr.state.pa.us/forestry](http://www.dcnr.state.pa.us/forestry).

#### C. *Statutory Authority*

This final-form rulemaking is made under the authority in sections 302, 313 and 502 of the Conservation and Natural Resources Act (71 P. S. §§ 1340.302, 1340.313 and 1340.502) and 18 Pa.C.S. §§ 7505 and 7506 (relating to violation of governmental rules regarding traffic; and violation of rules regarding conduct on Commonwealth property).

#### D. *Background and Purpose*

Under Executive Order 1996-1, "Regulatory Review and Promulgation," the Department reviewed Chapter 23 and determined that it needed to be updated and streamlined. This final-form rulemaking is intended to accomplish these objectives.

#### E. *Summary of Comments and Responses and Changes Made in the Final-Form Rulemaking*

This final-form rulemaking was published as proposed at 32 Pa.B. 2851 (June 8, 2002), with a 60-day public comment period. As a result of comments received from the public and from the Independent Regulatory Review Commission (IRRC), the Department made a number of changes to the proposed rulemaking. The comments and changes are discussed as follows.

#### *Comment*

Section 23.22(d) (relating to miscellaneous prohibitions) of the previous regulations that prohibited disorderly conduct and obscene or lewd acts or dress should not be deleted. Even though these activities are covered by 18 Pa.C.S. (relating to the Crimes Code), it is more difficult for Department personnel to enforce the Crimes Code than to enforce its own regulations.

#### *Response*

The provision that was deleted from § 23.22(d) in the proposed rulemaking has been restored in this final-form rulemaking with a modification. The deleted provision prohibited disorderly conduct and obscene or lewd acts or dress. In this final-form rulemaking, that provision remains deleted from § 23.22, but a new section has been added which contains that provision. New § 23.24 (relating to disorderly, indecent, obscene, lewd conduct) adds indecent exposure to the activities that are prohibited. This provision is being retained in Chapter 23 because some State forest districts do not have DCNR rangers on staff to patrol picnic areas and therefore must rely on noncommissioned State forest officers for enforcement activities. Noncommissioned State forest officers do not have the authority to enforce the Crimes Code but do have the authority to enforce State forest regulations.

#### *Comment*

Sections 23.11(c)(1) and 23.22 (relating to schedule; and organized events) include the phrases "written permission of the Department" or "written authorization of the Department." Section 23.16 (relating to fires) references § 21.62(b) (relating to open fires), which includes the phrase "authorization from the District Forester or a designee." The final-form rulemaking should describe how to apply for "approval" or indicate where this information is available.

#### *Response*

In § 23.22, the word "authorization" has been replaced with "permission" to make it consistent with the language used in § 23.11(c)(1). "Permission of the Department" is defined in § 23.1 (relating to definitions) of the final-form rulemaking as "approval obtained from a district forester or designee."

#### *Comment*

Section 23.11(b) (relating to schedule) states: "A State forest picnic area may be closed by the Department to public use." The final-form rulemaking should identify how the public will be notified of a closure.

#### *Response*

This subsection and § 23.11(c) have been deleted in the final-form rulemaking because they duplicate provisions in § 21.4 (relating to State Forests—closure). Section 21.4(b) states that the public will be informed of the closure by "any form of communication, which may include posted signs, or by fencing or other enclosure manifestly designed to exclude intruders."

#### *Comment*

Section 23.15 (relating to trash and garbage disposal) which was entitled "litter" in the previous and proposed regulation, states that trash accumulated during the use of a picnic area may be placed in trash containers found in those areas. This revised section does not address litter. It addresses trash and garbage accumulated while

in a picnic area. The commentator recommended that the title of this section be changed to more accurately reflect the subject matter addressed.

*Response*

The heading of § 23.15 has been changed in the final-form rulemaking to “trash and garbage disposal.”

*Comment*

Under § 23.16(a), “open fires” are permitted in “designated facilities,” but neither term is defined. The Department should either define or provide examples of these terms in the final-form rulemaking.

*Response*

To clarify this subsection, the word “open” has been deleted, and the term “designated facilities” has been replaced with “fire rings and fireplaces provided by the Department.” In addition, to make it clear that visitors may bring gas grills and camp stoves to picnic areas, the final-form rulemaking states that fires will be permitted in these appliances.

*Comment*

Section 23.16(d) refers to § 21.62(b) that prohibits “open fires” in picnic areas from March 1 through May 25 and from October 1 through December 1 without authorization from a district forester. Is this prohibition needed since § 23.16(a) only allows fires in designated facilities? If the reference is retained, the term “open fires” needs to be used consistently in both § 23.16 and § 21.62.

*Response*

As discussed in response to the previous comment, the words “open” and “designated facilities” have been deleted in § 23.16(a) for purposes of clarification. Consistent with this change, § 23.16(d) has been clarified in the final-form rulemaking to state that fires in fire rings and fireplaces are subject to the prohibitions in § 21.62(b).

*Comment*

Section 23.22 (relating to organized events) requires written authorization from the Department for an “instruction, exhibition, competition, demonstration or other organized or special event” but does not define these events or indicate a minimum number of participants. The section should clearly state what specific activities require a permit. It should also specify the minimum number of people that constitute a group or event.

*Response*

Because of the wide variety of events that could be covered by this section and because of the many factors that could affect the impact of a particular group or event in a particular picnic area at a particular time, it would be impossible to adequately define those events and to specify a minimum number of participants. Examples of events that are covered by this section are day camps, family reunions, church services and archery instruction. Organized events for which picnic areas are used as staging areas are also covered by this section. Examples are ice skating, running, walking, bicycling events, motorcycle competitions, motorcycle rides, sports car rallies, orienteering competitions and fishing derbies.

The picnic area regulations have always included an organized event provision similar to this one. The provision has been understandable to the public and has provided the necessary flexibility for forest districts to work with the public in accommodating many kinds of activities. For these reasons, the Department has not added the specificity suggested by the comment.

In addition to the changes made in this final-form rulemaking in response to comments it received on the proposed rulemaking, the Department also made a change as a result of its own review of the proposed rulemaking. In the proposed rulemaking, § 23.12 (relating to motor vehicles) was deleted because it duplicated provisions in § 21.21 (relating to motor vehicles), which applies to all State forest land including picnic areas. In the final-form rulemaking, the provision that was in § 23.12(c) has been restored (with a minor editorial modification) because it prohibits nuisance operation of motor vehicles. It has been useful for prosecuting persons who, for example, repeatedly cruise picnic loops, annoying picnickers.

*F. Benefits, Compliance Costs*

Executive Order 1996-1 requires a cost/benefit analysis of the final-form rulemaking.

*Benefits*

Visitors to the 27 State forest picnic areas will benefit from the improved protection of, and recreational opportunities in, these areas.

*Compliance Costs*

The amendments to Chapter 23 impose no additional costs or paperwork requirements on the general public, local governments or the private sector. The amendments will result in the negligible cost to the Commonwealth of posting camping permit conditions for Asaph and County Bridge State forest picnic areas.

*G. Sunset Review*

Chapter 23 will be monitored by the Department to determine whether the regulations effectively accomplish their intended goals.

*H. Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 22, 2002, the Department submitted a copy of this proposed rulemaking, published at 32 Pa.B. 2851, to IRRC and the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comment received during the public comment period. In preparing this final-form rulemaking, the Department has considered comments from IRRC and the public. No comments were received from the legislative committees.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on November 14, 2002, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 21, 2002, and approved the final-form rulemaking.

*I. Order*

The Department acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 17 Pa. Code Chapter 23, are amended by amending §§ 23.1—23.3, 23.11, 23.12, 23.14—23.17, 23.20 and 23.22; deleting §§ 23.13, 23.18, 23.19, 23.21 and 23.41—23.47; and by adding §§ 23.23 and 23.24 to read as set forth in Annex A.

(b) The Department shall submit this order and Annex A to the Office of General Counsel and the Office of

Attorney General for approval and review as to legality and form, as required by law.

(c) The Department shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

JOHN C. OLIVER,  
*Secretary*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 5593 (November 9, 2002).)*

**Fiscal Note:** Fiscal Note 7B-4 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 17. CONSERVATION AND NATURAL RESOURCES**

**PART I. DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES**

**Subpart C. STATE FORESTS**

**CHAPTER 23. STATE FOREST PICNIC AREAS**

**PRELIMINARY PROVISIONS**

**§ 23.1. Definitions.**

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

*Permission of the Department*—Approval obtained from a district forester or a designee.

*State forest picnic area* or *picnic area*—An area on State forest land designated by the Department as a State forest picnic area.

**§ 23.2. Application.**

State forest picnic areas are subject to Chapter 21 (relating to general provisions) and this chapter.

**§ 23.3. Violations.**

(a) A person who engages in an act which is prohibited by § 21.21 or § 21.25 (relating to State Forests—motor vehicles; and State Forests—parking) commits a summary offense under 18 Pa.C.S. § 7505 (relating to violation of governmental rules regarding traffic).

(b) A person who engages in an act which is prohibited by this chapter, other than an act prohibited by § 21.21 or § 21.25, commits a summary offense under 18 Pa.C.S. § 7506 (relating to violation of rules regarding conduct on Commonwealth property).

**MISCELLANEOUS PROVISIONS**

**§ 23.11. Schedule.**

(a) State forest picnic areas are open to the public between sunrise and sunset.

(b) Except as provided in subsection (c) or except with written permission of the Department, entering, using or remaining in a State forest picnic area when it is not open to the public under subsection (a) is prohibited.

(c) Entering a State forest picnic area when it is not open to the public under subsection (a) is permitted for

the purpose of fishing or gaining access to another area of State forest land that is open for public use.

**§ 23.12. Motor vehicles.**

Operation of a motor vehicle in a manner that is reckless or negligent or that creates a nuisance or excessive noise is prohibited.

**§ 23.13. (Reserved).**

**§ 23.14. Alcoholic beverages.**

Possession or consumption of alcoholic beverages is prohibited.

**§ 23.15. Trash and garbage disposal.**

If containers for disposal of trash and garbage are provided by the Department, trash and garbage accumulated during use of a State forest picnic area may be placed in these containers. Disposing of any other material in these containers is prohibited.

**§ 23.16. Fires.**

(a) Fires are permitted in fire rings and fireplaces provided by the Department and in gas grills and camp stoves. Charcoal fires are permitted in appliances designed for that purpose. Other fires are prohibited.

(b) Disposing of hot charcoal except in a facility designated by the Department for charcoal disposal is prohibited.

(c) Leaving a fire that has not been completely extinguished is prohibited.

(d) Fires in fire rings and fireplaces are subject to the prohibition in § 21.62(b) (relating to open fires).

**§ 23.17. Hunting, trapping and shooting.**

Hunting, trapping and the discharge of firearms, bows and arrows, or other devices capable of launching projectiles are prohibited.

**§ 23.18. (Reserved).**

**§ 23.19. (Reserved).**

**§ 23.20. Pets.**

Pets are prohibited unless they are on a leash not exceeding 6 feet and are attended at all times.

**§ 23.21. (Reserved).**

**§ 23.22. Organized events.**

An instruction, exhibition, competition, demonstration or other organized activity or special event is prohibited without written permission of the Department.

**§ 23.23. Removal of facilities.**

Removal from State forest picnic areas of picnic area facilities, including picnic tables, grills, fire rings, or containers for disposal of trash, garbage or charcoal is prohibited.

**§ 23.24. Disorderly, indecent or obscene or lewd conduct.**

Disorderly conduct, indecent exposure, and obscene or lewd acts or dress is prohibited.

**§§ 23.41—23.47. (Reserved).**

[Pa.B. Doc. No. 03-10. Filed for public inspection January 3, 2003, 9:00 a.m.]

# Title 31—INSURANCE

## INSURANCE DEPARTMENT

### [31 PA. CODE CH. 165]

#### Workers' Compensation Security Fund

The Insurance Department (Department) adopts Chapter 165 (relating to Workers' Compensation Security Fund) to read as set forth at 32 Pa.B. 3398 (July 13, 2002) and as set forth in Annex A.

#### *Statutory Authority*

This final-form rulemaking is adopted under the authority of sections 205, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412); and the Workers Compensation Security Fund Act (act) (77 P. S. §§ 1051—1066).

#### *Comments and Response*

Notice of proposed rulemaking was published at 32 Pa.B. 3398 with a 30-day comment period. During the 30-day comment period, comments were received from the Alliance of American Insurers (AAI) and the Insurance Federation of Pennsylvania, Inc. (IFP).

During its regulatory review, the Independent Regulatory Review Commission (IRRC) submitted comments to the Department. The following is a response to those comments.

The AAI stated that the Department's regulation, particularly § 165.7 (relating to assessment) should be consistent with the statute provisions under section 5 of the act (77 P. S. § 1055) which limits the assessment on an insurer to 1% of its net written premiums for the period covered by its annual return. The statute also provides for the elimination of the assessment when the aggregate amount of payments into the fund, along with accumulated interest, less expenditures and known liabilities, is equal to 5% of the loss reserves of all insurers and reciprocal exchanges. The AAI then stated that when the amount in the fund is reduced below the 5% of the loss reserves, the assessment on insurers is resumed. And since the remainder of the rule mirrors the statutory provisions, § 165.7 should also mirror the statutory provisions relating to the contribution made to the fund by insurers.

Apparently, the AAI was not aware that the intent of the General Assembly was to eliminate an assessment unless absolutely needed. The act indicates that the amendments to section 5 of the act and section 10 of the act (77 P. S. § 1060) would take effect on the effective date of the regulations promulgated under section 9(1) of the act (77 P. S. § 1059(1)). It is the Department's intent to eliminate the assessment, in accordance to the General Assembly's wishes, until absolutely necessary. The formula that the Department has suggested in § 165.7 meets that intention and is appropriate; therefore, the Department has not changed the section as requested by the AAI.

The IFP stated that as the Department has closely followed the language of Act 49, the Federation had no comments to the Department's proposed language. The IFP supported the prompt promulgation of the chapter and looks forward to working with the Department on areas of mutual concern during its implementation.

#### *Department Thanks the IFP for its Support on this Rulemaking*

IRRC during its review had only two concerns. First, in § 165.7, subsection (c) stated, "The assessment, when necessary, will be billed by December 31 of the year subsequently, used in the actuarial study." The reference to "the year subsequently used in the actuarial study" is confusing. It was IRRC's understanding that the bill will be issued by December 31 of the year in which the actuarial study is completed. IRRC suggested that subsection (c) should be amended in the final-form rulemaking to clearly reflect the timing of the bill. IRRC also wanted the Department to consider using an example to clarify this subsection.

Second, IRRC noted that in subsection (d), the word "be" should be deleted in the phrase "is be due by March 31."

The Department has no problem with the clarification as requested and has changed subsection (c) to read "The assessment, when necessary, will be billed by December 31 of the year that the actuarial study is completed. (Example: Data from the 2002 calendar year is used, the actuarial study is completed in 2003, then the assessment will be made by December 31, 2003.)"

The Department also corrected subsection (d). This error was due to a change that was made in the publishing of the proposed rulemaking and was not in the original proposed rulemaking as submitted by the Department to the Legislative Committees and IRRC.

#### *Affected Parties*

The final-form rulemaking applies to insurance companies doing the business of workers' compensation insurance companies in this Commonwealth.

#### *Fiscal Impact*

##### *State Government*

There will be no increase in cost to the Department due to the adoption of this final-form rulemaking.

##### *General Public*

The adoption of this final-form rulemaking will not impose additional costs on the general public.

##### *Political Subdivisions*

The adoption of this final-form rulemaking will not impose additional costs on political subdivisions.

##### *Private Sector*

This rulemaking may result in a savings of \$1 million dollars to the private sector (insurance industry) over a 5-year period.

##### *Paperwork*

This final-form rulemaking will not result in any additional paperwork requirement on the Department.

##### *Effectiveness/Sunset Date*

This rulemaking will become effective upon final publication in the *Pennsylvania Bulletin* as final-form regulations. No sunset date has been assigned.

##### *Contact person*

Questions regarding this final-form rulemaking should be directed to Peter J. Salvatore, Regulatory Coordinator, Office of Special Projects, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-4429. In addition, questions may be e-mailed to [psalvatore@state.pa.us](mailto:psalvatore@state.pa.us) or faxed to (717) 705-3873.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on October 25, 2002, the Department submitted a copy of the proposed rulemaking to IRRC and to the Chairpersons of the House Insurance Committee and the Senate Banking and Insurance Committee. In addition to the submitted proposed rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the agency in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of that material is available to the public upon request.

In preparing these final-form regulations, the Department considered all comments received from IRRC, the Committees and the public. Under section 5.1(d) of the Regulatory Review Act (71 P.S. § 745.5a(d)), this final form rulemaking was deemed approved by the House and Senate Committees on November 14, 2002. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 21, 2002, and approved the final-form rulemaking.

*Findings*

The Commissioner finds that:

(1) Public notice of intention to adopt this final-form rulemaking as amended by this order has been 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 thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The adoption of this rulemaking in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statutes.

*Order*

The Commissioner, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 31 Pa. Code, are amended by adding §§ 165.1—165.6 and 165.8 to read as set forth at 32 Pa.B. 3398; and by adding § 165.7 to read as set forth in Annex A.

(b) The Commissioner shall submit this order, 32 Pa.B. 3398 and Annex A to the Office of General Counsel and Office of Attorney General for approval as to form and legality as required by law.

(c) The Commissioner shall certify this order, 32 Pa.B. 3398 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) The rulemaking adopted by this order shall take effect upon final-form publication in the *Pennsylvania Bulletin*.

M. DIANE KOKEN,  
*Insurance Commissioner*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 32 Pa.B. 6016 (December 7, 2002).)*

**Fiscal Note:** Fiscal Note 11-210 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 31. INSURANCE**

**PART VIII. MISCELLANEOUS PROVISIONS**

**CHAPTER 165. WORKERS' COMPENSATION SECURITY FUND**

**§ 165.7. Assessment.**

(a) The amount of an assessment will be determined by using the actuarial services described in § 165.5 (relating to administration).

(b) Every carrier, doing the business of workers' compensation insurance in this Commonwealth, will be assessed, based on a prorata share of the total amount of net-written premiums of workers' compensation insurance reported as written in the previous calendar year's annual statement.

(c) The assessment, when necessary, will be billed by December 31 of the year that the actuarial study is completed. (Example: Data from the 2002 calendar year is used, the actuarial study is completed in 2003, then the assessment will be made by December 31, 2003.)

(d) Payment of the assessment, when applicable, is due by March 31 of the year following the assessment.

[Pa.B. Doc. No. 03-11. Filed for public inspection January 3, 2003, 9:00 a.m.]

**Title 34—LABOR AND INDUSTRY**

**DEPARTMENT OF LABOR AND INDUSTRY**

**[34 PA. CODE CH. 65]**

**Reasonable Assurance**

The Department of Labor and Industry (Department) adds § 65.161 (relating to reasonable assurance) to read as set forth in Annex A.

*Statutory Authority*

The final-form rulemaking is promulgated under section 201(a) of the Unemployment Compensation Law (law) (43 P.S. § 761(a)), which authorizes the Department to adopt and amend rules and regulations necessary to administer the law.

*Background and Purpose*

The purpose of this final-form rulemaking is to bring the Commonwealth unemployment compensation (UC) eligibility criteria into conformity with the United States Department of Labor's (USDOL) requirements under section 3304(a)(6)(A) of the Federal Unemployment Tax Act (FUTA) (26 U.S.C.A. § 3304(a)(6)(A)) with regard to a principle known as "reasonable assurance."

FUTA requires the states to deny UC benefits based on services in an instructional, research or principal administrative capacity for an educational institution, for any week between 2 academic years or terms, if the claimant performed services in any of those capacities in the first year or term and there is a contract or reasonable assurance that the claimant will perform services in any of those capacities in the second year or term. States must also deny benefits based on services in an instructional, research or principal administrative capacity for an educational institution, for any week during a vacation

period or holiday recess, if the claimant performed services in any of those capacities before the vacation or holiday and there is a reasonable assurance that the claimant will perform services in any capacity after the vacation or holiday. States may deny benefits based on services for an educational institution in a capacity other than instructional, research or principal administrative, for any week between 2 academic years or terms, or any week during a vacation period or holiday recess, if the claimant performed these services in the first year or term or before the vacation or holiday and there is a reasonable assurance that the claimant will perform services in any capacity in the second year or term or after the vacation or holiday. These denial provisions also apply to claimants who are employed by an educational service agency. These provisions apply to governmental and nonprofit educational institutions and educational service agencies (collectively, educational employers). See section 3304(a)(6)(A) of FUTA.

The USDOL imposes requirements on the states regarding the interpretation and application of the statute. Unemployment Insurance Program Letter 4-87 (52 FR 3889) sets forth the USDOL's official interpretation of "reasonable assurance" in FUTA. It provides that a reasonable assurance of employment in the second academic period exists only if there is a bona fide offer of employment and the economic terms and conditions of the employment in the second academic period are not substantially less than the terms and conditions of the claimant's employment in the first academic period. For example, if a full-time teacher is given an offer to return to work as a part-time substitute teacher in the following academic year, employment in the second academic period would not be economically equivalent to employment in the first academic period, as required by the USDOL. Therefore, there is no reasonable assurance and the teacher should be eligible for benefits for the summer.

The Commonwealth's implementation of the FUTA provisions regarding the eligibility of employees of educational employers is found in section 402.1 of the law (43 P. S. § 802.1). Section 402.1(1) and (2) of the law denies benefits based on services for an educational institution, for any week between 2 academic years or terms. Paragraph (1) applies to services in an instructional, research or principal administrative capacity. Paragraph (2) applies to services in any other capacity. Paragraph (3) denies benefits based on services in any capacity for an educational institution, for any week during a vacation period or holiday recess. Paragraph (4) extends the denial provisions of paragraphs (1)–(3) to services performed in the employ of an educational service agency. The denial provisions of section 402.1 of the law require the existence of a contract or reasonable assurance of employment in the second academic period.

Currently, the Commonwealth does not include economic equivalency as a necessary element of reasonable assurance. In *Musko v. Unemployment Compensation Bd. of Review*, No. 2740 C. D. 1997 (Pa. Cmwlth., filed June 23, 1998) (unreported), appeal denied, 558 Pa. 624, 737 A.2d 745 (1999), the claimant was a full-time school teacher in the first academic year and received an assurance of returning to work as a per diem or long-term substitute teacher in the second academic year. Commonwealth Court held that the claimant was ineligible for benefits for the summer because he worked in an instructional capacity in the first year and had an assurance of returning to work in an instructional capacity for the second year. However, the economic terms and conditions of the position offered to him for the second year were

substantially less than the terms and conditions of his job in the first year. If the economic equivalency test had been applied as required by the USDOL, the claimant would have been eligible for UC benefits.

To conform to FUTA, the Commonwealth and other states can deny benefits to employees of educational employers only to the extent authorized by Federal law. In *Musko*, the Commonwealth went beyond the scope of the Federal law as interpreted by the USDOL when it denied benefits to a claimant who was not offered an economically equivalent position for the next school year. As a result, the USDOL informed the Department that it was out of conformity with the Federal law.

To conform to the USDOL's reasonable assurance requirements, the Department adopts this final-form rulemaking.

#### Comments

The Department published a notice of the proposed rulemaking at 31 Pa.B. 1564 (March 24, 2001). Under the 30-day public comment period, the Department received comments from the Interstate Tax Service Bureau (ITSB). The Senate Labor and Industry Committee and the House Labor Relations Committee (Committees) did not comment. The Independent Regulatory Review Commission (IRRC) submitted one comment to the Department.

*Comment:* ITSB stated that the Commonwealth is following the USDOL's interpretation of reasonable assurance and that *Musko* is an isolated departure from Federal requirements.

*Response:* The Commonwealth does not include economic equivalency in its analysis of reasonable assurance, as required by the USDOL. Although *Musko* is the case that precipitated notice from the USDOL that the Commonwealth is out of conformity with Federal law, it is not a unique case. There are other similar cases when a claimant was denied benefits, but likely would have been granted benefits if economic equivalency had been a factor. *Neshaminy School District v. Unemployment Compensation Bd. of Review*, 426 A. 2d 1245 (Pa. Cmwlth. 1981) (long-term substitute teacher converted to day to day substitute teacher for next school year); *Richland School District v. Unemployment Compensation Bd. of Review*, 459 A. 2d 1358 (Pa. Cmwlth. 1983) (tenured, contract teacher and tenured, preferred substitute teacher placed on substitute call list for next year); *Board of Education, School District of Philadelphia v. Unemployment Compensation Bd. of Review.*, 609 A. 2d 596 (Pa. Cmwlth. 1992) (long-term substitute teachers converted to per diem substitute teachers for following year).

*Comment:* ITSB was concerned that the requirements for a "bona fide offer of employment" under the final-form rulemaking will be the same as the requirements for an offer of work under section 402(a) of the law (43 P. S. § 802(a)).

*Response:* Under section 402(a) of the law, a claimant may be ineligible for benefits if the claimant refuses an offer of suitable work. Section 402(a) of the law requires an unconditional offer of work and a guarantee of employment if the offer is accepted. *McKeesport Hospital v. Unemployment Compensation Bd. of Review*, 619 A.2d 813 (Pa. Cmwlth. 1992). The requirements under section 402(a) of the law will not extend to the final-form rulemaking, as the analysis under section 402(a) of the law is different than the analysis under section 402.1 of the law. Section 402.1 of the law requires only a reasonable assurance of employment. While a possibility or hope of employment does not rise to the level of reasonable

assurance, there need not be a guarantee of employment. Reasonable assurance necessitates mutual commitment or assurance between the teacher and the educational employer, so the teacher has a reasonable expectation of employment in the next academic period. *McCuen v. Unemployment Compensation Bd. of Review*, 486 A. 2d 552 (Pa. Cmwlth. 1985).

*Comment:* ITSB commented that the rulemaking contradicts section 402.1 of the law.

*Response:* Section 402.1(1) of the law and the final-form rulemaking are not inconsistent. Under section 402.1(1) of the law, a claimant is ineligible for benefits between academic periods if the claimant worked in an instructional, research or principal administrative capacity during the first academic period and has a reasonable assurance of returning to work in one of those capacities for the second academic period. The final-form rulemaking does not contravene the provision in section 402.1(1) of the law that a claimant is ineligible for benefits if the claimant has a reasonable assurance of reemployment, or the requirement that reasonable assurance relate to employment in specified capacities. Rather, the regulation defines reasonable assurance and sets forth criteria that must be met for reasonable assurance to exist.

*Comment:* IRRC stated that the final-form rulemaking should include factors that will be used to determine whether the economic terms and conditions of the employment offered to the claimant for the second academic period are, or are not, substantially less than the terms and conditions of the claimant's employment in the first academic period.

*Response:* The Department agrees with IRRC's comment. The Department added subsection (c) to the final-form rulemaking, which provides that economic terms and conditions of employment include wages, benefits and hours of work. Therefore, these factors will be used to compare the employment offered to the claimant for the second academic period with the claimant's employment in the first academic period.

*Effective Date*

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

The final-form rulemaking will apply to applications for benefits effective on or after the date of publication.

*Fiscal Impact*

The final-form rulemaking is necessary to bring the law into conformity with FUTA and avoid substantial adverse impact to the Commonwealth. If the Commonwealth does not adopt the rulemaking and is adjudged to be out of conformity with Federal law, the Secretary of the USDOL would withdraw FUTA certification from the Commonwealth. This would abrogate administrative funding for both the UC system and the employment service. In addition, Commonwealth employers would lose the FUTA tax credits to which they are entitled by paying State UC taxes. The loss of administrative funding and tax credits would cost the Commonwealth approximately \$1.95 billion annually, based on figures for the 1998 calendar year, 1998-1999 program year and 1998-1999 fiscal year.

It is uncertain whether the final-form rulemaking will have a fiscal impact on the UC Fund. Employees of educational employers who are not given a reasonable assurance of returning to work, in accordance with the regulation, would be eligible for UC benefits. However, eligibility for these employees could prompt affected

employers to provide the level of reasonable assurance required by the final-form rulemaking, and cause an eventual decrease in benefit payments.

An increase in the cost of administering the UC program would be nominal, because no measurable increase in personnel, time or resources will be necessary to administer section 402.1 of the law as impacted by the final-form rulemaking.

*Paperwork Requirement*

No new paperwork is required.

*Sunset Date*

The final-form rulemaking will be monitored through practice and application. Thus, no sunset date is designated.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 8, 2001, the Department submitted a copy of the notice of proposed rulemaking, published at 31 Pa.B. 1564, to IRRC and to the Chairpersons of the House and Senate Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period. In preparing this final-form rulemaking, the Department has considered the comments received from IRRC, the public and stakeholders. The Department received no comments from the Committees.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on October 17, 2002, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 24, 2002, and approved the final-form rulemaking.

*Contact Person*

Questions regarding this final-form rulemaking may be directed to Jeri Morris, Department of Labor and Industry, Bureau of Unemployment Compensation Benefits and Allowances (BUCBA), 6th Floor, Labor and Industry Building, Seventh and Forster Streets, Harrisburg, PA 17121, (717) 787-6337, jemorris@state.pa.us.

*Findings*

The Department finds that:

- (1) The Department gave public notice of its intention to promulgate this regulation 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 thereunder in 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments received were considered.
- (3) This final-form regulation does not enlarge the purpose of the proposed regulation published at 31 Pa.B. 1564.
- (4) This regulation is necessary and appropriate for the administration of the law.

*Order*

The Department, acting under the authority of the law, orders that:

(a) The regulations of the Department, 34 Pa. Code Chapter 65, are amended by adding § 65.161 to read as set forth in Annex A.

(b) The Secretary of Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as required by law.

(c) The Secretary of Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) The regulation shall take effect immediately upon publication in the *Pennsylvania Bulletin*, and apply to applications for benefits effective on or after the date of publication.

JOHNNY J. BUTLER,  
*Secretary*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 5582 (November 9, 2002).)*

**Fiscal Note:** Fiscal Note 12-56 remains valid for the final adoption of the subject regulation.

#### Annex A

### TITLE 34. LABOR AND INDUSTRY

#### PART II. EMPLOYMENT SECURITY

#### Subpart A. UNEMPLOYMENT COMPENSATION

#### CHAPTER 65. EMPLOYEE PROVISIONS

#### Subchapter I. BENEFITS BASED ON SERVICE FOR EDUCATIONAL INSTITUTIONS

Sec.

65.161. Reasonable assurance.

#### § 65.161. Reasonable assurance.

(a) For purposes of section 402.1 of the law (43 P. S. § 802.1), a contract or reasonable assurance that an individual will perform services in the second academic period exists only if both of the following conditions are met:

(1) The educational institution or educational service agency provides a bona fide offer of employment for the second academic period to the individual.

(2) The economic terms and conditions of the employment offered to the individual for the second academic period are not substantially less than the terms and conditions of the individual's employment in the first academic period.

(b) For the purposes of subsection (a), an offer of employment is not bona fide if both of the following conditions exist:

(1) The educational institution or educational service agency does not control the circumstances under which the individual would be employed.

(2) The educational institution or educational service agency cannot provide evidence that the individual or similarly situated individuals normally perform services in the second academic period.

(c) For the purposes of subsection (a), economic terms and conditions of employment include wages, benefits and hours of work.

[Pa.B. Doc. No. 03-12. Filed for public inspection January 3, 2003, 9:00 a.m.]

## Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

### STATE ARCHITECTS LICENSURE BOARD

#### [49 PA. CODE CH. 9]

#### Annual Renewal Fee for Registered Architecture Firms and Examination Fees

The State Architects Licensure Board (Board) amends §§ 9.3, 9.41, 9.46 and 9.49a; adds §§ 9.41a, 9.51 and 9.52; and deletes §§ 9.111, 9.113, 9.114, 9.116—9.118, 9.131 and 9.132 to read as set forth at 32 Pa.B. 1731 (April 6, 2002) and as set forth in Annex A.

#### A. Effective Date

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

#### B. Statutory Authority

This final-form rulemaking is authorized under sections 8, 11 and 13 of the Architects Licensure Law (act) (63 P. S. §§ 34.8, 34.11 and 34.13).

#### C. Background and Purpose

The Board is amending § 9.3 (relating to fees) by implementing an annual renewal fee for registered architecture firms and eliminating reference to the cost of taking the Architect Registration Examination (ARE) which is given by the National Council of Architectural Registration Boards (NCARB). The Board is further amending or adding the remaining sections by deleting references to the procedures for taking the ARE and by rearranging license eligibility and examination requirements in a more cohesive and orderly fashion.

#### Deletion of Reference to the ARE Fee

The Board is eliminating reference to the ARE examination fee over which the Board has no control or involvement. The ARE is a recognized uniform examination used throughout the United States. The General Assembly has indicated its preference for the recognition of National uniform examinations and grading services in accordance with section 812.1 of The Administrative Code of 1929 (71 P. S. § 279.3a). The fee for the examination is established by the National examiner and communicated directly to the applicants. Applicants for the examination pay the examination fee directly to the National examiner. Thus, it is unnecessary and impractical for the Board to continue to publish the National examiner's examination fee in the Board's regulations.

In lieu of publishing the cost of the examination, the Board adds § 9.41a (relating to adoption of National board examinations), which promulgates the adoption of National board examinations, including the fee established by NCARB.



*Annual Renewal Fee for Registered Architecture Firms*

General operating and enforcement expenses of the Board are apportioned to the general licensee population through the collection of license renewal fees. Section 11(a) of the act requires the Board to increase fees by regulations.

Section 13(j) of the act states that the Board shall, by promulgation of rules and regulations, require that registered architecture firms file with the Board information concerning their officers, directors, partners, professional association board of governors, beneficial owners, members or managers and other aspects of their organization as the Board deems appropriate. This section also authorizes the Board to charge each registered architecture firm an annual filing fee in an amount determined by the Board.

No renewal fee has been established for registered architecture firms. Therefore, the Board is establishing a renewal fee for the registration of architectural firms, thereby causing licensed firms to contribute to the general operating and enforcement expenses of the Board.

The annual fee of \$50 will be collected by the Board biennially. This means that, every 2 years, the Board will collect \$100 from each registered architecture firm.

*Examination and Grading Procedures*

Section 8(c) of the act authorizes the Board to adopt the examination and recommended grading procedures adopted by NCARB. Because the adoption of NCARB's examination and grading procedures would eliminate the Board's role in the process, the Board is deleting regulations outlining its role in the administration of the examination.

*D. Comment and Regulatory Review of Proposed Rule-making*

Publication of proposed rulemaking at 32 Pa.B. 1731 was followed by a 30-day public comment period during which the Board received no public comments. Following the close of the public comment period, the Board did not receive comments from the House Professional Licensure Committee (HPLC), the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) or the Independent Regulatory Review Commission (IRRC).

*Licensure by Examination*

Section 9.41 (relating to general requirements) informs candidates that the subject matter of the ARE examination is available from NCARB.

Section 9.41a adopts the National board examination, including the fee established by NCARB.

Section 9.49a(a) (relating to diversified training requirements) informs candidates that information concerning the Intern Development Program (IDP) of NCARB is available directly from NCARB. Subsection (b) directs candidates to have NCARB transmit a certificate of completion of IDP to the Board.

*Grading and Review*

Sections 9.51 and 9.52 (relating to examination grading; and grading compilation) are identical to §§ 9.131 and 9.132. Sections 9.131 and 9.132 now become §§ 9.51 and 9.52 so that they will appear along side the related regulations referring to licensure by examination and examination. Sections 9.131 and 9.132 are deleted.

*Examination*

Section 8(c) of the act authorizes the Board to adopt the examination and recommended grading procedures adopted by NCARB. It is unnecessary to continue to publish §§ 9.111, 9.113, 9.114 and 9.116—9.118. The Board is deleting those sections.

*F. Compliance with Executive Order 1996-1*

The Board reviewed this final-form rulemaking and considered its purpose and likely impact on the public and the regulated population under the directives of Executive Order 1996-1, "Regulatory Review and Promulgation." With regard to the annual renewal fee for registered architecture firms, the Board considers this final-form rulemaking the least restrictive alternative to cover the costs associated with services provided to registered architecture firms.

*G. Fiscal Impact and Paperwork Requirements*

This final-form rulemaking will implement an annual renewal fee for registered architecture firms in this Commonwealth, but, otherwise, should have no fiscal impact on the private sector, the general public or political subdivisions.

This final-form rulemaking requires the Board to alter some of its forms to reflect the new fee. The final-form rulemaking should create no additional paperwork for the private sector.

*H. Sunset Date*

The Board continuously monitors the cost effectiveness of its regulations and no sunset date has been assigned.

*I. Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 4, 2000, the Board submitted copies of the notice of proposed rulemaking, published at 32 Pa.B. 1731, to IRRC and to the Chairpersons of the SCP/PLC and the HPLC for review and comment.

The Board did not receive any comments from IRRC, the SCP/PLC, the HPLC or the public.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on November 13, 2002, this final-form rulemaking was deemed approved by the HPLC and the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)), the amendments were deemed approved by IRRC effective November 14, 2002.

*J. Contact Person*

Further information may be obtained by contacting Dorna Thorpe, Board Administrator, State Architects Licensure Board, 116 Pine Street, P. O. Box 2649, Harrisburg, PA 17105-2649, dothorpe@state.pa.us.

*K. Findings*

The Board 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.

(3) This final-form rulemaking does not enlarge the purpose of proposed rulemaking published at 32 Pa.B. 1731.

(4) This final-form rulemaking is necessary and appropriate for administering and enforcing the authorizing act identified in Part B of this Preamble.

L. *Order*

The Board, acting under its authorizing statutes, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 9, are amended by amending §§ 9.3, 9.41, 9.46 and 9.49a; by adding §§ 9.41a, 9.51 and 9.52; and by deleting §§ 9.111, 9.113, 9.114, 9.116—9.118, 9.131 and 9.132 to read as set forth at 32 Pa.B. 1731.

(b) The Board shall submit this order and 32 Pa.B. 1731 to the Office of General Counsel and to the Office of the Attorney General as required by law.

(c) The Board shall certify this order and 32 Pa.B. 1731 and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect on publication in the *Pennsylvania Bulletin*.

ANN SHEPARD HOUSTON,  
*President*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 6016 (December 7, 2002).)*

**Fiscal Note:** Fiscal Note 16A-416 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 03-13. Filed for public inspection January 3, 2003, 9:00 a.m.]