

RULES AND REGULATIONS

BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

DEPARTMENT OF STATE

[49 PA. CODE CH. 43b]

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 this 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 2, 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 final-form rulemaking effectuates Act 6 of 2018.

Purpose and Explanation

This final-form 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.” This 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 as Subchapter A. New Subchapter B sets forth the requirements to apply for and obtain expungement of disciplinary records in accordance with Act 6 of 2018. New Subchapter C 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 of Professional and Occupational Affairs (Bureau) legal office staff, including administrative overhead. Rather than include the fee in new 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 (71 P.S. § 279.1).

Notice of proposed rulemaking was published 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 this 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 Cynthia 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 Cynthia 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. Cynthia 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 the 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 (73 P.S. §§ 2260.101—2260.5101).

Fiscal Impact and Paperwork Requirements

This 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 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 August 14, 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 August 15, 2019, and approved this final-form rulemaking.

Additional Information

Individuals who need information about this final-form rulemaking may contact the Bureau of Professional and Occupational Affairs, 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 (relating to notice of proposed rulemaking required; and adoption of regulations).
- (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.
- (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 by adding §§ 43b.101—43b.103 and 43b.201 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

(Editor’s Note: See 49 Pa.B. 5078 (August 31, 2019) for IRRC’s approval order.)

Fiscal Note: 16A-60. No fiscal impact; (8) recommends adoption.

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

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Subchapter B. EXPUNGEMENT

Sec.

43b.101. Definitions.

43b.102. Expungement of disciplinary records.

43b.103. Application for expungement.

§ 43b.101. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates 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 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 services) for expungement of a disciplinary record.

Subchapter C. FEES

Sec.

43b.201. Fees for services.

§ 43b.201. Fees for services.

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

Expungement of a disciplinary record \$155

[Pa.B. Doc. No. 19-1439. Filed for public inspection September 27, 2019, 9:00 a.m.]