

Senate Judiciary Committee
Public Hearing on Criminal History Reform
October 15, 2018
10:30am
Hearing Room 1, North Office Building
Written Testimony of Ian Harlow, Acting Deputy Secretary for Regulatory Programs and
Commissioner of Professional and Occupational Affairs
Pennsylvania Department of State

Thank you, Chairman Greenleaf, Minority Chairman Leach and members of the Judiciary Committee for allowing the Department of State to submit written comments for the record on its efforts in reforming the way criminal histories are used to determine eligibility for licensure. The Department, through its Bureau of Professional Occupations and Affairs (“BPOA”) administers and enforces practice requirements for the professional licensure of 29 professional boards and commissions, effectively regulating 255 different license classifications, and one million licensees.

BPOA was established in 1963 as part of the Department of State to provide administrative, logistical and legal support services to the boards and commissions. The licensee classes regulated by each board and commission vary significantly. The Pennsylvania Board of Nursing, for example, oversees the Commonwealth’s largest professional licensee class, and oversees the licensure of more than 312,000 nurses and dietitian-nutritionists, while the smallest—the Navigation Commission for the Delaware River and its Navigable Tributaries—licenses just 42 maritime pilots. The Pennsylvania State Board of Medicine, respectively, is the regulatory body responsible for oversight of the broadest class of licensure, with 93,276 active licensees across 36 different license types. In total, the Health Licensing Division of BPOA regulates 332,842 active licensees annually.

Each board and commission, as a creature of statute, is governed by its practice act, establishing the scope of its powers and duties, defining the practice of its profession, and setting forth the types of licenses which it may grant. These statutes also mandate the training, education and other requirements under which a board may grant those licenses and sets forth the standards of conduct to which a person or entity, once licensed, must adhere in order to protect public health safety and well-being. Additionally, BPOA is responsible for the discipline and enforcement of those standards of conduct as promulgated by the respective board. Because each board is governed by an independent statute, the level of discretion afforded to the Board, and consequently the Department in its administration of discipline varies widely. These variations in legislative and regulatory authority can and often do lead to disparate policies, and needless barriers to entry.

The Effects of Prior Criminal History Policies

According to the National Employment Law Project, there are conservatively 70 million Americans – one in three - that have some criminal record, and 700,000 citizens return to their

communities from incarceration every year.¹ These individuals rely on a combination of family support, community assistance and economic opportunity to stay out of the criminal justice system. Access to employment and professional development opportunities - a critical component to any measure of success a returning citizen is likely to have – is severely limited. Gainful employment provides more than just the financial means for one’s self and family, but also connections to community, and society as a whole.

In 2017, the Governor ordered the comprehensive and comparative review of the Commonwealth’s processes, fees, training requirements, criminal history policies, reciprocity or interstate agreements, and continuing education requirements for occupational and professional licensure.² This *Executive Review of State Professional and Occupational Licensure Board Requirements and Processes* was completed in June of 2018 with the intent to provide information to the Governor and assist administration officials in identifying opportunities to remove unnecessary restrictions that prevent Pennsylvanians from gaining employment without compromising the health and safety of residents. Among the processes reviewed were the use of criminal history bans and disciplinary actions. The Report specifically examined which Boards employed automatic bans for prior convictions, the type of convictions that triggered disciplinary actions and the length of the ban.

Prior Criminal History Use in Determining Licensure

Pennsylvania’s professional and occupational licensing boards are authorized under the Criminal History Records Information Act (Title 18, Pa. C.S., §§ 9101-9106) (“CHRIA”) to consider an applicant’s criminal convictions in making licensure decisions. Boards may deny licensure or discipline a licensee based upon either a felony conviction, or a misdemeanor related to the profession sought. While there is no crime for which a conviction would be a complete lifetime bar to licensure, the following 13 boards – the majority of which are health-related³ – are prohibited from issuing a license to an applicant who has been convicted in the last ten years of a felony under the Controlled Substance, Drug, Device and Cosmetic Act (CSA), or of an offense under the laws of another jurisdiction which if committed in Pennsylvania would be a felony under the CSA.

CHRIA does not define any articulable criteria for making the determination of eligibility when either a felony or misdemeanor conviction is present. The state actor is therefore left to their own devices in determining whether the past criminal history should be factored, how it is factored, and the weight given to the past offenses (or offenses). Where other states have

¹ National Employment Law Project (NELP), Research Fact Sheet, June 2016 can be retrieved here: <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>

² Executive Order 2017-03: *Review of State Professional and Occupational Licensure Board Requirements and Processes*.

³ State Boards with a mandatory 10-year ban for felony CSA violations include: Chiropractic, Crane, Dentistry, Massage, Medicine, Nursing, Optometry, Osteopathic Medicine, Pharmacy, Physical Therapy, Psychology, Social Work, Marriage and Family Therapists and Professional Counselors and Veterinary Medicine.

legislated such standards, those boards not constrained by automatic bans must rely upon board counsel to consider the following factors in making their determinations:

- The seriousness of the crime(s);
- The date of the crime(s); the age of the person at the time of commission of the crime(s);
- The age(s) of the victim(s) of the crime (if applicable);
- The circumstances, if known, surrounding the commission of the crime(s);
- The nexus between the criminal conduct and the applicant's prospective duties as a licensee;
- The prison, jail, probation, parole, rehabilitation and employment records of the applicant since the commission of the crime(s); and
- Any affidavits or other written documents, including character references provided as mitigating evidence on the applicant's behalf.

When the above criteria are employed, the board has the flexibility to determine discipline on a case-by-case basis, in the matter it sees fit, and best employs its collective experience, professional training and common-sense to render decisions that are based on the totality of an applicant or licensee's circumstances rather than a one-size-fits all approach.

Comparison of Felony Bans Among Neighboring States

Criminal history use policy varies wildly among states. Some impose a ban for drug convictions, while others impose a ban for crimes involving sexual misconduct or may prevent licensure while charges are pending. Among sister states within its geographical region⁴, Pennsylvania is an outlier in its scope of application – no other state authorizes automatic bans for drug convictions across as many boards as the Commonwealth. The closest regional analogue, Delaware, imposes automatic bans for drug convictions upon just five boards⁵ - less than half of the Commonwealth total. While a handful of states have similar automatic bans in place, most authorize consideration of criminal history only under certain circumstances, such as whether the crime was related to the occupation being licensed.

The Executive Report also examined the number of disciplinary actions over the past two years, based upon the commission of a crime, and found less than 14% resulted in an automatic suspension. Further, when the Department reviewed data on disciplinary actions taken over the last decade, it found that this statistic dropped precipitously, with the total number of automatic suspensions totaling just 512 – statistically less than one percent of the total number of the affected licensee population (approximately 613,000 affected professionals, when combining the nursing population with the designated health professionals.)

⁴ Regional states for comparison include: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Vermont and West Virginia.

⁵ Chiropractic, Dentistry, Pharmacy, Psychology and Veterinary Medicine.

Conclusion

The Administration and Department fully support legislative efforts to memorialize and restore the proper level of discretion and flexibility to all professional boards in order to provide them with the proper tools to best regulating their licensees. Uniform policies do not guarantee uniform results, and the boards themselves are the best arbiters of an individuals merits for licensure.

Thank you for allowing us to provide these comments for your review. Please let the Department know if you have any additional questions or concerns.