



COMMUNITY LEGAL SERVICES
OF PHILADELPHIA



June 17, 2024

Independent Regulatory Review Commission
Via email: irrc@irrc.state.pa.us

**No. 3361, Bureau of Professional and Occupational
Affairs #16A-66 (Consideration of Criminal
Convictions)(Resubmission of Final-Form Rulemaking)**

Dear Commissioners:

We write to strongly urge your approval of the occupational licensing reform regulations as resubmitted by the Bureau of Professional and Occupational Affairs (BPOA). As explained below, any disagreement that one might have with specific offenses, or lack thereof, on the “directly related” lists should be put aside, given the difficulty inherent in generating a consensus for such a list, the stout backstop of the requirement that all felonies and misdemeanors not on the lists are to be considered at Step 2 of Act 53’s analysis, and the consequences of having to start the regulatory process over if the package is ultimately rejected.

The nature of the process to generate the “directly related” lists is unlikely to generate consensus.

Given the hundreds of offenses in the criminal code that might make the “directly related” lists for the 29 boards and commissions, the nature of this exercise makes it is unlikely that *anyone* will be completely happy with the offenses that appear, or do not appear, on the lists. Probably anyone who looks at the lists in any depth could find reason to quibble with why a certain offense is treated as it is.

Nevertheless, this regulatory package should not go down in flames merely because there may be some minor disagreement on the lists’ contents. The rulemaking has been going on since the proposed package was submitted in November 2022. Countless hours have been spent by agency staff, IRRC staff, and public commenters on this package since then. Meanwhile, license applications have been handled under interim lists that mirror the now discredited proposed regulations instead of the roundly supported final regulations. Going back to the beginning again is not a solution that anyone should want.

Moreover, there are safeguards that protect against any arguable mistakes with leaving offenses off the lists. Most notably, Step 2 analysis allows the circumstances of any felony or

misdemeanor conviction to be potentially disqualifying, notwithstanding that is not presumed disqualifying by being on the list.

BPOA’s process for generating the lists was sound.

In its revisions to the proposed regulations, BPOA adopted an evidence-based approach to the identification of the “directly related” offenses to which a presumption of unfitness attaches that had been missing in the proposed package. It identified key responsibilities for the licensed occupations through the U.S. Department of Labor’s O*Net Online database. Then it determined whether a particular offense relates to all licensees engaged in the occupation, as well as whether the offense bears a meaningful relationship to the necessary duties. Attachment A to Regulatory Analysis Form, pages 1-2.

BPOA also acknowledged and adhered to the intent of the law as explained by the four prime sponsors of the legislation, which expressed that the “directly related” lists were largely overbroad and that the lifetime presumption of unfitness was inconsistent with the intent of the law. Finally, it acknowledged the many public comments criticizing the lists.

Moreover, each board’s list is supplemented by the crimes of violence and drug trafficking offenses that are directly related for specified periods of time and circumstances under regulations of general applicability as required by Act 53. See Section 43b.404(c)-(d).

The results of the agency’s rigorous analysis led to final regulations that were far more consistent with the legislative intent of Act 53 than the original proposal. The agency indicates that after the disapproval, it again reviewed the lists, concluding that changes to the lists were not warranted. Report of the Acting Commissioner of Professional and Occupational Affairs, Response to IRRC’s Order Disapproving Regulation 16A-66 – Consideration of Criminal Convictions (IRRC No. 3361), at 3.

As the IRRC’s acknowledged in its disapproval order, it is not the Commission’s role to micromanage the schedule of offenses. BPOA’s evidence-based approach should provide comfort that the exercise of identifying offenses for the lists was done appropriately.

Step 2 of the Act 53 analysis is an effective backstop for any omissions from the lists.

The final regulations require the boards and commissions to consider *any* offenses not on the directly related lists on an individual case basis, with respect to the nature of the conviction. Section 43b.404(a)(2)(ii). This requirement provides more than enough latitude for boards to evaluate any offense which arguably should have been on a directly related list.

Note that consideration of the “nature” of the offense is a particularly appropriate way to evaluate whether an applicant potentially presents a substantial risk to health and safety. The directly related lists attach the presumption of unfitness simply based on the elements of a conviction. By contrast, the facts of specific offenses within a crimes code definition can vary greatly, in terms of seriousness and relevance to an occupation.

For instance, the crime of “terroristic threats” (itself a prejudicial criminal code term that seldom has anything to do with terrorism) could have involved one night at a bar in which the offender exhibited regrettably poor judgment. Or it could have involved a vulnerable person, or a person in the setting in which the applicant seeks to be licensed. The latter surely has more relevance than the former. And if in fact the offense was tightly connected to the occupation, the absence of terroristic threats from a list will not prohibit the board giving the conviction its due weight.

This Step 2 analysis remains a very broad basis for disqualification (arguably, too broad, from the perspective of some applicants). But without a presumption of unfitness against them, people with criminal records at least have a foot in the door and a chance to show rehabilitation for entrance into a profession that could make all the difference to their families and themselves.

Finally, note that if in the practice of reviewing cases under Step 2 a board concludes that an offense should have been included on the directly related list, it can propose a new regulation doing so.

Conclusion

The fourth anniversary of Act 53 is upon us. Yet the intended beneficiaries of the law are still waiting for the promise of the law to become real for them. Rejecting this regulatory package and starting over will set back the benefits that the statute meant to confer yet several more years. Nothing about the resubmitted package in front of the IRRC would justify such an unfortunate development.

We strongly urge the IRRC to approve the final-form rulemaking for Act 53.

Very truly yours,

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