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Governor

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DEPARTMENT OF PROFESSIONAL
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Anne L. Head
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MEMORANDUM

To: Senator Donna Bailey
Representative Rachel Talbot Ross
Criminal Records Review Committee
c/o Jane.Orbeton@legislature.maine.gov

From: Anne Head, Director, DPFRO Office of Professional and Occupational Regulation

Date: November 19, 2021

Subject: Responses to Information Requests from November 8, 2021 Meeting

The licensing boards, commissions, and programs within the Office of Professional and Occupational Regulation (“OPOR”) are charged with the important mission of protecting the public from incompetent, unscrupulous and dishonest practitioners in many professions and occupations. Our license application review process is designed to treat each applicant, regardless of profession or background, in a fair and equitable manner.

Maine has been a leader in its efforts to license individuals despite their criminal history. Maine law (Title 5, Chapter 341, titled Occupational License Disqualification on Basis of Criminal Record), guides our decision-making in the context of license eligibility determinations. Importantly, Chapter 341 provides that a criminal conviction *shall not operate as an automatic bar to state licensure*.

Please note my responses are limited to the licensing entities within OPOP. We defer to the Affiliated Boards to speak on their own behalf.

1. *With regard to an applicant for licensure or certification for a profession or occupation whose application is denied by a board under the authority of or affiliated with the Office of Professional and Occupational Regulation, what right does the applicant have to request review under the Administrative Procedure Act or appeal to the District Court? Please provide data on reviews under the APA and appeals to the District Court under Title 5, section 5304 from the last few years.*

a. *Rights to request review and appeal.* For OPOP boards and programs, the process is as follows:

- At the time an individual applies for a license, they are notified that OPOP requires a criminal history records check as part of the application process. As of 2018, OPOP

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does not require an applicant to disclose their criminal history on an initial license application. This was done so as to not discourage individuals with criminal history from taking the first step to apply for licensure.

Currently, the only option for almost all OPOR boards, commissions, and programs¹ is the Maine State Bureau of Identification criminal history records check (“SBI report”). SBI reports are limited in nature. They only contain information that is reported by Maine criminal justice agencies and do not include criminal history record information maintained by the federal government or from other states. At this time, OPOR does not have statutory authority to use a national databank (e.g. FBI background check) that requires the use of fingerprints or some other biometric information to search for an applicant’s records. This authority would need to be statutory and approved by the Department of Justice.

It is worth noting, however, as a result of bills passed during first session of the 130th Legislature, Maine has now joined both the Psychology Interjurisdictional Compact (PSYPACT) and the Occupational Therapy Licensure Compact, which will eventually require that the Psychology and OT boards use the results of fingerprints or other biometric data checks for *all* applicants to obtain criminal history information from the FBI.

- Board staff² reviews the SBI report to see if there are results that indicate that the individual has been convicted of a crime that falls within the types of convictions and within the time limits set forth in 5 M.R.S. §§ 5301-5303. If questions arise, staff consults with the Assistant Attorney General (“AAG”) assigned to the board or program. The AAG can also assist with requesting additional records from the criminal court docket, if more detail about the underlying crime giving rise to the conviction is needed.
- If a board concludes the individual has been convicted of a crime, consisting of the type and within the time limits as set forth in Title 5, Chapter 341, then the applicant will receive a notice that their application is preliminarily denied pursuant to 5 M.R.S. §§ 5301 *et seq.* The individual receives notice that they have thirty (30) days from receipt of the notice to ask the board in writing for an adjudicatory hearing. At the hearing, the applicant has the opportunity to present to the board evidence they have been sufficiently rehabilitated to warrant the public trust. *See* 10 M.R.S. § 8003 (5-A)(G) (“[t]he office, board or commission shall hold a hearing conforming to the requirements of Title 5, chapter 375, subchapter 4 at the written request of any person who is denied an initial or renewal license without a hearing for any reason other than failure to pay a fee, provided that the request for the hearing is received by the office,

¹ Pursuant to Title 32, Section 14021(7), an applicant for a certified general, certified residential, real property appraiser, or an appraiser trainee license must submit a set of fingerprints for a statewide and a nationwide criminal history record check to be used in determining an applicant’s eligibility.

² “Board staff” is used for ease of reference; however, the regulatory functions (referred to as “programs”) administered by OPOR follow substantially the same procedures. Instead of a board, the Director of OPOR has statutory authority to make the licensing decisions as to applicants for licensure governed by an OPOR program.

board or commission within 30 days of the applicant’s receipt of written notice of the denial of the application, the reasons for the denial and the applicant’s right to request a hearing.”)

- At the conclusion of an adjudicatory hearing, the board will issue a Decision and Order. The Decision and Order will contain a finding as to whether the applicant has met the burden of proving that they have been sufficiently rehabilitated to warrant the public trust. It will also direct board staff whether to issue the license and if so, with what, if any, conditions or probation or to issue a final denial of the license application.

If the applicant wishes to appeal the licensing decision contained in the Decision and Order, they may appeal the decision to the Superior Court³ within thirty (30) days after receipt of notice of the decision. The Decision and Order contains a notice informing the applicant of the right to appeal.

- b. *Data on requests to review and appeals to Superior Court from the last few years.*

We are currently working on reviewing and analyzing this data and will provide it to the subcommittee under separate cover at a later date.

2. *With regard to a license applicant who has a criminal record, how does that applicant show to the licensing board rehabilitation “sufficiently to warrant the public trust” as required by Title 5, section 5302, subsection 1?*

As discussed during my presentation, OPOR boards do not follow a rubric statutory set of standards to determine whether someone has been rehabilitated “sufficient to warrant the public trust.” The applicant can share with the board whatever information they feel is helpful to demonstrate rehabilitation. At the prehearing conference, the Hearing Officer provides an overview of the hearing; including that the burden of proof is on the applicant to demonstrate rehabilitation and the kinds of information that boards are generally looking for to support rehabilitation.

Boards will consider any kind of evidence and information that the applicant would like to share. For example, in cases in which substance abuse is a factor in the crime underlying the conviction at issue, boards are looking for evidence of treatment and interaction with a recovery community. Other factors boards usually consider include evidence of stable employment, stable relationships, involvement in the community generally, stable housing, and efforts at restitution. Applicants can present evidence of rehabilitation in the form of letters and/or oral testimony by an applicant’s current employer or supervisor, their counselor, and/or their family and friends. Moreover, boards are interested in what positive behavior an

³ While the District Court has concurrent jurisdiction to impose discipline against occupational and professional licenses, Title 10 provides that the right to a judicial review of a disciplinary action of the board after an adjudicatory hearing resides exclusively in the Superior Court in accordance with Title 5, chapter 375, subchapter 7. 10 M.R.S. § 8003(5-A)(G). We acknowledge, however, that 5 M.R.S. § 5304, entitled “Appeals,” states that “[a]ny person who is aggrieved by the decision of any licensing agency in possible violation of this chapter may file a statement of complaint with the District Court designated in chapter 375.” It is possible that Section 5304 contemplates a decision being made without the opportunity for an adjudicatory hearing, which does not reflect OPOR’s process.

individual exhibited when incarcerated, whether the applicant successfully completed a period of probation, what the applicant's probation officer may have reported (*i.e.*, any probation violations/did applicant abide by all conditions of probation), and whether any new crimes have been committed.

A board also has the discretion to fashion probation or supervisory requirements when authorizing board staff to issue a license. These decisions reflect the need for a balancing act in light of the fact that the "sole purpose of an occupational and professional regulatory board is to protect the public health and welfare." 10 M.R.S. § 8008. There are many instances in which a board grants an applicant a lower level of license than the level of licensure requested, as the board may feel that the applicant had not shown sufficient rehabilitation to warrant independent practice without supervision. An example may be that someone applied for a journeyman electrician license, but instead was granted a helper electrician license, which is a level of licensure that requires supervision by a journeyman or master electrician.

We believe that the current process is working well as evidenced by the overwhelming majority of applicants becoming licensed despite past criminal history. We would be interested to know whether this committee has heard that OPOR license applicants have been unduly denied licensure based on criminal history, since that is not our experience.

3. *With regard to a license applicant who has a criminal record who is seeking to satisfy the burden of proof under Title 5, section 5302, subsection 1, demonstrating rehabilitation sufficient to warrant the public trust, what level of proof must the applicant show to the licensing board?*

An applicant who has a criminal conviction that falls within the type of conviction and the time limit permitted for consideration under Title 5, Chapter 341, must demonstrate they are rehabilitated sufficient to warrant the public trust by a preponderance of the evidence. Superior Court Justice Nancy Mills has noted in a 2008 decision that while the Law Court has not explicitly recognized a default preponderance of the evidence standard in Maine's Administrative Procedure Act, this standard is common in professional disciplinary cases. *Bd. of Licensure in Med. v. Diering*, 2008 Me. Super. LEXIS 226, *8, *10 (Dec. 5, 2008) (Mills, J.) ("Although the legislature may require a different standard to be used in the administration of a specific statute, in most agency decisions, at least at the federal level, are based on a preponderance of the evidence standard"); *see also Douglas v. Bd. of Trustees*, 669 A.2d 177, 179 (Me. 1996) (burden before the Board of Trustees of Maine State Retirement System rests with the applicant to persuade the Board by a preponderance of the evidence that he is disabled). However, there is no standard of proof articulated in either the Maine Administrative Procedure Act or any OPOR board or program statutes.

Please note that board staff has the initial burden to prove the conviction. Typically, applicants will stipulate to the fact of the conviction(s) in the prehearing conference. The Hearing Officer then makes a determination whether the conviction falls within 5 M.R.S. §§ 5301 *et seq.* The burden of proof then shifts to the applicant to prove by a preponderance of the evidence that they have been sufficiently rehabilitated to warrant the public trust.

4. *With regard to two applicants who have criminal records who are seeking licensure by two different licensing boards under the authority of or affiliated with OPOR, what is the basis for the varying lengths of time that their convictions disqualification the applicants?*

The time limits set forth in 5 M.R.S. § 5303 were established by the Legislature in P.L. 1975, c. 150. The statement of fact accompanying LD 402 of the 107th Legislature, a bill that had been referred to the Committee on the Judiciary and presented by a “Mrs. Boudreau of Portland,” states:

Presently there are no uniform standards for the consideration of prior criminal records as an element in the certification process for trades and occupations licensed by the State. This legislation sets up such uniform standards, and establishes the general principle that while prior conviction of any applicant may be considered fully and within reasonable time limits by an occupational licensing agency, in no case shall prior conviction in itself constitute an automatic or arbitrary bar in perpetuity to obtaining a license to work.

This legislation effects recommendation #71 of the report of the Governor’s Task Force on Corrections and is drawn from model legislation recommended by the American Bar Association.

In the 1975 (initial) version of Section 5303, the law stated “procedures outlined in sections 5301 and 5302 for the consideration of prior criminal conviction as an element of fitness to practice a licensed trade or occupation shall apply within 3 years of the applicant’s final discharge, if any, from the correctional system. Beyond the 3-year period, ex-offender applicants with no additional convictions are to be considered in the same manner as applicants possessing no prior criminal record for the purpose of licensing decisions.”

The two tiers of time limits for consideration of convictions emerged as a result of LD 563, introduced during the 114th Legislature in 1989 and referred to the Committee on Business Legislation, presented by Senator Kany of Kennebec and cosponsored by Representative Joseph of Waterville, Senator Baldacci of Penobscot and Senator Gauvreau of Androscoggin. The bill proposed several significant amendments to Chapter 341:

- Allow licensing agencies to consider criminal history information not only from Maine but from other states in determining eligibility for granting a license.
- Add a category of convictions which may be considered in connection with an application for an occupational license for certain state agencies:

Convictions for which incarceration for less than one year may be imposed and which involve sexual misconduct by an applicant or licensee of the Board of Registration in Medicine, the Board of Osteopathic Examination and

Registration, the Board of Dental Examiners, the State Board of Examiners of Psychologists, the State Board of Social Worker Licensure, the Board of Chiropractic Examination and Registration, the State Board of Examiners in Physical Therapy and the State Board of Nursing.

- Clarify that the burden of proof is on the applicant or licensee to show there exists sufficient rehabilitation to warrant the public trust; and
- Extend for applicants or licensees of certain boards the period of time for consideration of prior criminal conviction as an element of fitness to practice a licensed profession, trade, or occupation, from three years to ten years. The bill proposed the ten-year limit would apply to the Board of Registration in Medicine, the Board of Osteopathic Examination and Registration, the Board of Dental Examiners, the State Board of Examiners of Psychologists, the State Board of Social Worker Licensure, the State Board of Nursing, the Board of Chiropractic Examination and Registration, and the State Board of Examiners in Physical Therapy.
- Eliminate any time limitation for consideration of an applicant's conduct which gave rise to the criminal conviction if that conduct is otherwise a ground for disciplinary action against a licensee.

The Committee file for LD 563 reveals support for the bill was provided by the Augusta Area Business and Professional Women's Club, the Maine Commission for Women, Maine Citizens Against Sexual Abuse, and Rape Crisis Assistance, Inc. These groups expressed they were in favor of the ability of health-related professional boards to consider convictions for minor sexual misconduct offenses as well as increasing the time limit to 10 years for those professions. The bill passed out of committee 12-0, with one absence.

The 3- and 10-year time limits for different boards has existed in law since LD 563 (enacted as P.L. 1989, c. 84) went into effect. Over time, additional health boards have been added to the list of licensing agencies that may consider minor sexual misconduct offenses and that may consider convictions with a ten-year limit. (*See, e.g.,* P.L. 1995, c. 625; P.L. 2005, c. 347).

5. *What state and federal laws disqualify a person who has a criminal record from professional or occupational licensure or certification by a board under the authority of or affiliated with OPOR?*

For OPOR, pursuant to Title 5, Chapter 341, Section 5301(1), a State licensing agency *may* take into consideration certain criminal history record information from Maine or elsewhere. The existence of this criminal conviction history information shall not operate as an automatic bar to being licensed or permitted to practice any profession, trade, or occupation. We are not aware of any other state or federal laws that generally apply to OPOR boards and programs.

6. *What training is provided to incoming members of licensing boards under the authority of*

or affiliated with OPOR?

OPOR strives to provide each new board member with an orientation on their role as a board member and their responsibility to protect the public's health safety and welfare. The administrator of each board/commission provides an individual or small group orientation which focuses on the board member's ethical responsibilities and their role in licensing, rulemaking, and the complaint process. During this process, new members receive a copy of the applicable laws and rules, including Title 5, Chapter 341.

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