

**Maryland General Assembly
Department of Legislative Services**

**Proposed Regulations
Department of Health and Mental Hygiene
(DLS Control No. 15-124)**

Overview and Legal and Fiscal Impact

The regulations update procedures for disciplinary matters and hearings before the State Board of Podiatric Medical Examiners.

The regulations present one legal issue of concern.

There is no fiscal impact on State or local agencies.

Regulations of COMAR Affected

Department of Health and Mental Hygiene:

Board of Podiatric Medical Examiners: Hearing Procedures: COMAR 10.40.05.01-.10

Legal Analysis

Summary of Regulations

The regulations update procedures for disciplinary matters and hearings before the board. Among other modifications, the regulations define terms used in the regulations, establish the confidentiality of proceedings, authorize representation by counsel, revise prehearing procedures, establish provisions governing sanctions, hearings, and final orders by the board, authorize the board to impose conditions of probation, and establish procedures for violations of probation. The regulations also establish procedures for a post-disciplinary reinstatement of a license, provide for judicial review of board orders, and entitle the board to reimbursement of costs under certain circumstances. Specific and noteworthy procedures are addressed below.

Definitions: Among other terms, the regulations define a “case resolution conference” to mean an informal, confidential meeting between the parties to a contested case and the board’s case resolution conference committee to discuss possible settlement of a disciplinary matter pending before the board. The definition of “charging document” specifies that it is a “nonpublic” record issued by the board which, among other information, alleges conduct by a licensee which the board believes constitutes a violation under the Maryland Podiatry Act. An “informal action” is defined to mean that board closes a case without taking formal disciplinary action or without issuing a final order, by imposing a disciplinary sanction consisting of a letter of education, letter of admonishment, cease and desist letter, or disposition agreement.

Confidentiality of Proceedings: Proceedings before the Office of Administrative Hearings (OAH) involving the adjudication of a board-contested case and the administrative law judge's (ALJ) recommended decision are confidential. The respondent may not waive the confidentiality of the proceedings or of the patients whose medical records or care are reflected in the record of the proceedings.

Representation by Counsel: A respondent may be represented by counsel at any stage of a formal disciplinary action. The board may request the Office of Attorney General to participate in a hearing to present the case on behalf of the State.

Prehearing Procedures: Under the regulations, the board may make a preliminary review of each complaint and recommend that cases involving complaints over which the board lacks jurisdiction be closed. The regulations authorize the board to send a copy of the complaint to the licensee that is the subject of the complaint to obtain a response to the allegations made in the complaint. After reviewing any completed investigative information or reports for each complaint, the board must dismiss the complaint, close the case with informal action, issue a cease and desist order, refer the matter for further investigation, or vote to take a specified action, such as charging a licensee with a violation of provisions of law in the Health Occupations Article or considering the matter as a basis for summary suspension if the board find that the matter requires emergency action.

The regulations also establish procedures for providing notice to a respondent when the board issues charges or a notice of initial denial of a license. If the board is unable to serve the charges or notice of initial denial upon the respondent, the board may nevertheless proceed in prosecuting the case.

Under the regulations, a party may require another party to produce, within 15 days, a list of the witnesses to be called and copies of all documents to be produced at the hearing. Each party must provide to the other party, within a time period specified in the regulations, the name and curriculum vitae of any expert witness that will testify at the hearing and a detailed report summarizing the expert's testimony.

The board must offer a respondent the opportunity for a case resolution conference (CRC) after service of charges or notice of initial denial and, at any other time during disciplinary proceedings, the board may offer or the respondent may request a CRC to discuss a disciplinary matter. Matters admitted, revealed, negotiated, or otherwise discussed at a CRC are without prejudice and may not be used by the respondent, administrative prosecutor, or the board in any subsequent proceedings, unless the information is otherwise discovered or available through another source.

Sanctions, Hearings, and Final Orders: The board may require conditions for surrender of a license. Unless the board determines that disclosure of the surrender is not in the public interest, a letter of surrender is a final order of the board and is a public record. Hearings must be conducted under Title 10 of the State Government Article (Administrative Procedure Act) and must be closed to the public. The board may delegate its authority to hear contested cases to the OAH.

If a matter has been delegated by the board to OAH, a party may file exceptions to the ALJ's proposed findings of fact, proposed conclusions of law, and proposed sanction before the board makes a final decision. Unless otherwise agreed by the parties and permitted by the board, an exceptions hearing must be scheduled for the next meeting of the board after receipt of the parties' exceptions and any answer to exceptions. An exceptions hearing must be held before the board and must be a nonevidentiary hearing to provide the parties with an opportunity for oral argument. After review of the record and deliberation, the board must issue a final order consisting of findings of fact, conclusions of law, and the sanction or disposition to be imposed.

Probation and Violation of Probation Proceedings: If the board imposes a period of probation as a sanction, the board may impose conditions of probation which the board considers appropriate. If the board determines that the licensee is not in compliance with the conditions of probation, the board must charge the licensee with a violation of probation, take any action the final order or consent order provides for a violation of probation, consider a summary suspension of the license, or take any other action the board considers appropriate and may take by law.

If the board issues charges for a violation of probation, service must be provided in a specified manner and the charging document must include specified information, such as any proceedings scheduled before the board or of an opportunity for the respondent to request a hearing within a certain period of time. If the respondent requests a hearing on the charge of a violation of probation, the board must, before the hearing, provide the respondent with a CRC to discuss settlement of the matter.

Post-Disciplinary Reinstatement of a License: Under the regulations, a licensee must petition the board for a termination of a suspension of a license or a reinstatement after revocation or surrender of a license. A licensee whose license has been revoked or surrendered for five or more years before filing a petition for reinstatement is ineligible for reinstatement but may apply for initial licensure. In considering a petition for reinstatement, the board may review the licensee's entire board file, including any information the board received after the licensee's suspension, revocation, or surrender.

Judicial Review and Cost Recovery: The regulations state that a final order of the board is subject to judicial review. The regulations also state that if after a hearing, a licensee is found to have violated any of the specified provisions in the Health Occupations Article relating to the practice of podiatry that establish grounds for disciplinary action, the board shall be entitled to reimbursement of costs by the licensee, such as expenses relating to witnesses appearing for the State, hearing-related per diems and expenses for board members, and other expenses directly related to the investigation and prosecution of the disciplinary action against the licensee.

Legal Issue

The regulations present one legal issue of concern. Under COMAR 10.40.05.05A(2), the board "*may* send a copy of the complaint, either in its entirety or redacted, to the licensee that is the subject of the complaint in order to obtain a response to the allegations made in the complaint." (Emphasis added.) However, § 16-205(b)(3) of the Health Occupations Article,

among other things, *requires* the board, “[o]n receipt of a written and signed allegation” to “[p]rovide notice to the licensed podiatrist that an allegation has been received and forward a copy of the allegation to the licensed podiatrist within 60 days of receipt of the allegation” unless the board (1) “[m]akes an affirmative determination that the disclosure would prejudice the investigation of the allegation and notifies the licensee of the determination”, (2) “[d]isposes of the allegation within 60 days of the date of receipt of the allegation”, or (3) “[m]akes an affirmative determination that any action that the board may take as a result of the investigation into the allegation will most likely not result in formal disciplinary action”. In generally authorizing the board to send a copy of the complaint to the licensee to obtain a response, the proposed regulatory standard potentially provides the board with more discretion when deciding whether to provide or withhold from the licensee a copy of the complaint than does the statutory standard, which requires the board to forward a copy of the allegation within 60 days of receiving it unless the board takes specified action justifying nondisclosure.

The Department of Health and Mental Hygiene has been notified of the potential legal issue of concern. The Assistant Attorney General for the board does not view the statute and regulation to be in conflict, given that the board is obliged to follow the statute first.

Statutory Authority and Legislative Intent

The department cites §§ 16-313 and 16-314 of the Health Occupations Article and § 10-206 of the State Government Article as statutory authority for the regulations. More specifically, § 16-313(a) of the Health Occupations Article requires the board to give the individual against whom a disciplinary action is contemplated an opportunity for a hearing before the board. Under § 16-313(b), the board must give notice and hold the hearing in accordance with the Administrative Procedure Act (APA). Section 16-313(c) and (d) specifies that the individual against whom disciplinary action is contemplated may be represented by counsel at the hearing and authorizes the board to issue subpoenas and administer oaths in connection with any investigation under the provisions of law governing the practice of podiatry and any hearings or proceedings before the board. Section 16-313(g) provides that if, after a hearing, an individual is found in violation of a provision of law governing the practice of podiatry that establishes grounds for disciplinary action, the individual must pay the costs of the hearing, as specified in a regulation adopted by the board.

Section 16-314(a) of the Health Occupations Article states, among other things, that the board must pass an order in accordance with the APA if the board finds that there are grounds for disciplinary action. Section 16-314(b) requires the holder of a license to surrender it to the board on demand if the license is revoked or suspended and also requires the board to return to the licensee, at the end of a suspension period, any license surrendered when a license is revoked or suspended by the board.

Section 10-206 of the State Government Article authorizes each agency to adopt regulations to govern procedures under the APA and practice before the agency in contested cases as well as regulations that provide for prehearing procedures in contested cases.

Although not cited by the department, § 16-205(a) of the Health Occupations Article authorizes the board to adopt regulations to carry out provisions of law governing the practice of podiatry and to investigate a written and signed allegation received by the board for any possible violation of the provisions of law governing the practice of podiatry. Section 16-310(b) of the Health Occupations Article authorizes the board to set conditions on its agreement with a licensee under investigation or against whom charges are pending to accept surrender of a license.

Section 16-311(a) of the Health Occupations Article authorizes the board to, subject to certain hearing provisions, deny a license or a limited license to any applicant, reprimand any licensee or holder of a limited license, impose an administrative monetary penalty not exceeding \$50,000 on any licensee or holder of a limited license, place any licensee or holder of a limited license on probation, or suspend or revoke a license or a limited license if the applicant or licensee engages in specified misconduct. Section 16-311(b) authorizes the board to revoke the license of a podiatrist who practices podiatry while the podiatrist's license is suspended. Section 16-311(c) authorizes the board to issue advisory opinions under specified circumstances. Section 16-311(d) authorizes the board to impose a monetary penalty – alone or in addition to a reprimand, probation, suspension, or revocation – for specified misconduct.

Section 16-312 of the Health Occupations Article provides the board with authority to investigate complaints and commence disciplinary action for specified misconduct. Section 16-315 of the Health Occupations Article authorizes a person who is aggrieved by a final decision of the board in a contested case to petition for judicial review under the APA.

Section 16-205(b) of the Health Occupations Article requires the board to provide notice to the licensed podiatrist that an allegation has been received and forward a copy of the allegation to the licensed podiatrist within 60 days of receipt of the allegation unless the board takes specified action justifying non-disclosure. As noted above, however, this provision establishes a different and potentially conflicting standard for complaint disclosure than regulation 10.40.05.05A(2).

With the addition of §§ 16-205, 16-310(b), 16-311, 16-312, and 16-315 of the Health Occupations Article, the authority cited by the department is correct and complete. With the exception of regulation 10.40.05.05A(2), the regulations comply with the legislative intent of the law.

Fiscal Analysis

There is no fiscal impact on State or local agencies.

Agency Estimate of Projected Fiscal Impact

The regulations repeal and replace existing procedures for disciplinary hearings before the Board of Podiatric Medical Examiners with new procedures, including new requirements for complaint investigation and prosecution, case resolution conferences, conditional probation, and

reinstatement of licenses. The department advises that the regulations update and make clarifying changes to the board's disciplinary procedures in order to improve consistency with the disciplinary procedures of other health occupations boards and that the board can implement the new procedures with existing resources; therefore, there is no fiscal impact. The Department of Legislative Services concurs.

Impact on Budget

There is no impact on the State operating or capital budget.

Agency Estimate of Projected Small Business Impact

The department advises that the regulations have minimal or no economic impact on small businesses in the State. The Department of Legislative Services concurs.

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