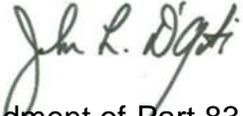




TO: Higher Education Committee

FROM: John L. D'Agati 

SUBJECT: Proposed Amendment of Part 83 of the Regulations of the Commissioner of Education Relating to Good Moral Character Proceedings on Charges Against a Certified Educator

DATE:

AUTHORIZATION(S):




SUMMARY

Issue for Discussion

Should the Board of Regents adopt the proposed amendment to Part 83 of the Regulations of the Commissioner of Education relating to good moral character proceedings on charges against a certified educator?

Reason(s) for Consideration

Review of Policy.

Proposed Handling

This item will come before the Higher Education Committee for discussion at its November 2015 meeting. A copy of the proposed amendment is attached as Attachment A.

Procedural History

A Notice of Proposed Rule Making will be published in the State Register on December 9, 2015. Supporting materials are available upon request to the Secretary to the Board of Regents.

Background Information

Education Law §305(7) authorizes the Commissioner of Education to annul or suspend the certificate of a certified educator or take certain other actions where the educator has engaged in misconduct. Part 83 of the Commissioner's Regulations establishes the procedures the State Education Department uses to carry out this statute through what is known as a "good moral character proceeding." Under Part 83, such a proceeding may be brought by the Department against a certified educator or an applicant for certification where a substantial question of moral character has been raised concerning the certified educator or applicant. The majority of cases concerning certificate holders involve sex-related convictions or inappropriate conduct with students related to a breach of the teacher-student boundary. Other cases are based on convictions for other crimes involving drugs, alcohol, violence, pornography, weapons, and other non-violent acts; or non-criminal based misconduct such as cheating on tests, grading issues, and verbal abuse of students. The majority of the cases concerning applicants for a teaching certificate are based on a criminal history, typically involving drugs and/or violence, or a certificate related action in another state.

In these Part 83 proceedings, certified educators and/or applicants have the right to a hearing to determine whether the individual's certification should be revoked or suspended or some other penalty should be imposed upon the certified individual. Under our current regulations, the hearing is held either before a single hearing officer or, at the option of the educator, before a hearing officer and a three-member hearing panel. If the educator opts for a panel, one member of the panel is selected by the educator and one by the State Professional Standards and Practices Board, and the third member is appointed by mutual agreement of those two members or by the Commissioner if they cannot agree. The regulations currently specify that the panel members in the good moral character proceeding are drawn from a list of names maintained by the Commissioner for tenured teacher hearings conducted pursuant to Education Law §3020-a. The Department has the burden of proving that there is a substantial question of moral character through evidence such as witness testimony and other exhibits. At the conclusion of the hearing, the hearing officer submits to the Commissioner a report of findings and recommendations which becomes the final decision if no appeal is taken or review proceeding commenced.

The amendments to Education Law §§305, 3020 and 3020-a and the creation of new §3020-b to streamline tenured teacher disciplinary proceedings (enacted as Chapter 56 of the Laws of 2015) eliminated the use of hearing panels in all tenured teacher disciplinary cases at the local level, and require that all these proceedings be heard by a single hearing officer. Consequently, the panel list from which panel members must currently be selected under §83.4(b) of the Regulations of the Commissioner no longer exists and the regulation needs to be amended to address the use of panels in Part 83 proceedings.

The proposed amendments would make the Part 83 process consistent with the §3020-a and §3020-b process and eliminate the panel option. They also establish minimum qualifications for hearing officers and create a rotational list of such hearing officers; give the Commissioner the ability to review all hearing officer recommended findings and penalties; clarify the manner in which an appeal is filed; give the Commissioner the power to remand a matter to the extent deemed necessary; and make other technical changes.

a. Eliminate the Use of Hearing Panels

The proposed amendment to Part 83 requires that all moral character hearings be before a single hearing officer. The amendment to the regulation is needed because the existing list of potential panel members was rendered obsolete by the changes to Education Law §3020-a which eliminated panels in tenured teacher disciplinary cases. Education Law §305(7), which governs Part 83 proceedings, includes a reference to the possibility of a decision by a panel, but does not require that educators be given the option for a panel. The use of a single hearing officer in Part 83 proceedings creates a similar streamlined process for moral character proceedings, and is consistent with the legislative intent to eliminate panels for §3020-a proceedings. Moreover, the use of hearing panels in Part 83 proceedings delays the resolution of cases due to inter alia, scheduling issues, litigation over the panel selection process, and the difficulty in selecting ready, willing and able panel members.

b. Create a Rotational List of Qualified Hearing Officers

The amendment requires the Commissioner to establish minimum qualifications for hearing officers, which would include that any individual selected to be on the rotational list of hearing officers be an attorney duly admitted to the practice of law in New York State who has experience as a hearing officer in Education Law §3020-a or §3020-b proceedings; served as a judge or justice in the courts of New York State or its equivalent; or significant administrative hearing or Education Law experience, as determined by the Commissioner. The hearing officers must be appointed on a rotational basis from a list of hearing officers maintained by the Commissioner, which will be developed after consultation with the Professional Standards and Practices Board. Currently, there are no minimum qualifications to be a hearing officer for these

cases. With the elimination of panels, this amendment is designed to ensure that only qualified individuals be appointed to serve as hearing officers in these cases.

c. Commissioner's right to review the hearing officer's recommended findings and penalties

The proposed amendment clarifies the right of the Commissioner to review the hearing officer's report of findings and recommendations, including the proposed penalty. Part 83 currently suggests that the hearing officer's report to the Commissioner contains "recommendations." In fact, as the regulations are written, the Commissioner is able to review and determine whether to accept the recommendations of the hearing officer only in a subset of moral character cases. The hearing officer's "recommendations" become the decision in the case, without review by the Commissioner, unless there is an appeal. Currently, the educator may appeal the hearing officer's recommendations in every case. However, the Commissioner may only review the recommendations of a hearing officer or panel in very limited circumstances - where the proceeding is based upon a conviction for certain crimes.¹ The Commissioner does not have the power to review the recommendation of a hearing officer or panel where the Part 83 proceeding against the certificate holder or applicant is based on other serious crimes or conduct involving moral character such as a conviction for a violent crime; sexual contact with a student age 17 or above; extensive grooming behaviors (through gifts, privileges, texting and/or other social media communications); the use of school computers during the school day to view pornography; sexual harassment of students and/or other school personnel on school grounds; verbal abuse of students; and test related cheating.

Hearing officers may make errors in their findings and recommendations, including misapplication of the law or the burden of proof, and/or could make inconsistent penalty recommendations for educators who engage in similar misconduct. Currently, as written, the Commissioner may not review these findings and recommendations unless they fall within a certain narrow category of cases involving criminal convictions. In effect, the Commissioner is forced to automatically implement the hearing officer's findings and recommendations without any review or assessment to determine whether such findings and recommendations are consistent with Education Law, the Commissioner's Regulations, prior Part 83 decisions and/or case law. This undercuts the Commissioner's authority with respect to the certification of educators pursuant to Education Law §305(7), deprives the Commissioner of the ability to protect students and the public in cases involving serious misconduct by an educator that does not involve a criminal conviction of the limited types currently listed in the regulation and can result in a mistaken public impression that the Commissioner agrees with the hearing officer's moral character assessment of a particular educator. The proposed

¹ The Commissioner currently may initiate a review of the findings and recommendations of the hearing officer (or hearing panel) where the case involves a conviction for certain drug crimes, crimes involving physical or sexual abuse of a minor or student, crimes committed on school property or crimes committed while teaching, or a crime involving fraud or the submission of false information in criminal history background check.

amendment, therefore, gives the Commissioner the discretion to initiate a review, where appropriate, of a hearing officer's findings and recommendations in cases where there is a misapplication of law or facts, or where the hearing officer recommends a penalty that is disproportionate to the underlying conduct. This properly preserves the Commissioner's authority in certification matters.

d. Clarify appeal/review procedures

The amendment clarifies the technical aspects of commencing an appeal by eliminating the need for the individual to both file papers with the Commissioner and serve a copy of the papers on the Executive Director of the Office of Teaching Initiatives. It permits the educator to commence an appeal by filing two copies of the appeal papers upon the Commissioner by mail. The Commissioner's designee must then transmit a copy of the appeal papers to the responsible office within the Department. This amendment also eliminates recurring confusion about service of appeal papers.

e. Commissioner remand

The proposed amendment also clarifies the authority of the Commissioner to remand a matter to the extent deemed necessary, for instance, in cases where there may have been a misapplication of the law or burden of proof, or an inconsistent penalty for similar misconduct. This will ensure that the Commissioner can seek to clarify an issue or request further findings in the event a record under review or appeal is incomplete.

f. Technical amendments

These proposed amendments also include minor technical corrections to Part 83 such as 1) changing the language identifying certain titles of responsible persons in the department to "the commissioner's designee" to eliminate the need to amend the regulations every time there is an administrative change within the Department; and 2) requiring an individual who has been served in a Part 83 proceeding to identify the address to which correspondence concerning the matter is to be addressed, and to notify the parties of any change in such address during the pendency of the matter.

Recommendation

Not applicable.

Timetable for Implementation

It is anticipated that the proposed amendment will come before the Higher Education Committee at its February 2016 meeting. If adopted at the February meeting, the proposed amendment will become effective March 9, 2016.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections §§207, 305, 3001, 3004, 3004-c, 3006, 3009, 3010 and 3035 of the Education Law.

Part 83 of the Regulations of the Commissioner of Education is amended, effective April 1, 2016, to read as follows:

§83.1 Determination of good moral character.

(a) Any information indicating that an individual holding a teaching certificate has been convicted of a crime, or has committed an act which raises a reasonable question as to the individual's moral character, shall be referred in a manner prescribed by the commissioner by the chief school administrator having knowledge thereof to the [professional conduct officer of the department] commissioner's designee.

(b) The appropriate official in school districts which by statute are empowered to grant teaching licenses shall notify the [professional conduct officer] commissioner's designee of the revocation, annulment or suspension of any license issued under that authority, together with the reasons therefor.

(c) Information in the possession of any person indicating that an applicant for a teaching certificate has been convicted of a crime, or has committed an act which raises a reasonable question as to the individual's moral character, may be referred to the [executive director of the Office of Teaching Initiatives of the State Education Department] commissioner's designee. Information in the possession of any person indicating that an individual holding a teaching certificate has been convicted of a crime, or has committed an act which raises a reasonable question as to the individual's moral

character, may be referred to the [professional conduct officer of the department] commissioner's designee.

(d) The [department] commissioner's designee shall review the findings and recommendations of hearing [panels] officers in hearings on charges against tenured teachers pursuant to Education Law [section] sections 3020-a and 3020-b and all such cases involving criminal convictions or acts which raise a reasonable question as to the teacher's moral character shall be referred [to the professional conduct officer] for investigation pursuant to section 83.2 of this Part.

§83.2 Investigation.

The [professional conduct officer] commissioner's designee shall direct that an investigation be done of the circumstances surrounding such conviction or act, and shall submit a report of the findings and a recommendation as to whether to proceed to a formal hearing to the State professional standards and practices board for teaching or to a subcommittee of such board, as determined in the bylaws of the board, composed of no fewer than five members approved by majority vote of the board, to consider such reports.

§83.3 Review by board.

If upon review of the report of the [professional conduct officer] commissioner's designee, such board or subcommittee concludes that a certified individual's moral character is adequate to permit continued certification as a teacher, or that an applicant's moral character is adequate to permit certification as a teacher, a report to this effect shall be forwarded by the board or subcommittee to the [executive director of the Office of Teaching Initiatives] commissioner's designee. If upon such review, the

board or subcommittee concludes that a substantial question exists as to the moral character of a certified individual or an applicant, notice of the basis for this conclusion and a copy of this Part shall be sent by certified mail, return receipt requested, to the certified individual or applicant.

§83.4 Hearing.

(a) Requests for hearing made prior to April 1, 2016.

(1) If requested by the certified individual or applicant, in writing to the [professional conduct officer] commissioner's designee, prior to April 1, 2016 and within 30 days after receipt of said notice that a substantial question exists as to the individual's moral character, a hearing shall be held on the issue of whether the individual's certification should be revoked or suspended or whether another penalty should be imposed upon the certified individual as prescribed in section 83.6 of this Part or whether the application for certification should be denied. In the request for a hearing, the certified individual or applicant may request that the hearing be held solely before a hearing officer or, in the alternative, before a hearing officer and a three-member hearing panel. Upon receipt of a request for a hearing, a hearing officer shall be appointed by the commissioner to hear and recommend, and a hearing scheduled. In the order designating a hearing officer, the commissioner shall also designate the place where said hearing will be held. At least 15 days before the hearing, the hearing officer shall give to the certified individual or applicant written notice by mail of the time and place of said hearing.

[(b)] (2) If a hearing panel has been requested, the members shall be selected in the following manner from the list maintained by the commissioner pursuant to the

provisions of Education Law section 3020-a: one member shall be selected by the certified individual or applicant, one member shall be selected by the State professional standards and practices board for teaching or a subcommittee thereof, as determined in the bylaws of the board, and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner. In the event that the certified individual or applicant has requested a hearing panel but fails or refuses to choose a hearing panel member within 30 days from the receipt of the panel list, the certified individual or applicant shall be deemed to have waived a hearing panel and the hearing shall be conducted before the hearing officer.

(b) Requests for hearing made on or after April 1, 2016.

(1) If requested by the certified individual or applicant, in writing to the commissioner's designee on or after April 1, 2016 and within 30 days after service of said notice that a substantial question exists as to the individual's moral character, a hearing shall be held on the issue of whether the individual's certification should be revoked or suspended or whether another penalty should be imposed upon the certified individual as prescribed in section 83.6 of this Part or whether the application for certification should be denied. In the request for a hearing, the certified individual or applicant shall provide an address to which all correspondence concerning the matter is to be addressed, if different from the address at which the certified individual or applicant was served. The certified individual or applicant shall also notify the hearing officer and the commissioner's designee of any change in address during the pendency of the matter.

(2) Upon receipt of a request for a hearing, a hearing officer shall be appointed by the commissioner on a rotational basis from a list of individuals maintained by the commissioner to hear and recommend, and a hearing scheduled. The commissioner shall establish minimum qualifications for such hearing officers which shall include that such individual be an attorney duly admitted to the practice of law in New York who has: experience as a hearing officer in Education Law §3020-a or §3020-b proceedings; served as a judge or justice in a New York State court or equivalent; or has experience satisfactory to the commissioner in conducting administrative hearings or in application of the Education Law. In the order designating a hearing officer, the commissioner shall also designate the place where said hearing will be held. At least 15 days before the hearing, the hearing officer shall give to the certified individual or applicant written notice by mail of the time and place of said hearing.

(c) . . .

(d) Evidence of conviction of a crime shall be admissible in any proceeding conducted pursuant to this Part, but such conviction shall not in and of itself create a conclusive presumption that the person so convicted lacks good moral character. Except as otherwise provided in paragraph (4) of this subdivision, in the case of a certified individual, proof of conviction for any of the following acts constituting a crime in New York State and committed subsequent to certification shall create a rebuttable presumption that the individual so convicted lacks good moral character:

(1) the criminal sale, possession or use of marijuana, a controlled substance, a precursor of a controlled substance or drug paraphernalia as defined in article 220 or 221 of the Penal Law; or

(2) any crime involving physical or sexual abuse of a minor or student; or

(3) any crime committed either on school property or while in the performance of teaching duties[.] ; or

(4) any crime committed involving the submission of false information, or the commission of fraud, related to a criminal history record check.

(e) . . .

(f) Upon the conclusion of the hearing, the hearing officer shall submit to the commissioner and to the certified individual or applicant or the attorney of record of such certified individual or applicant a report of the findings and recommendations or, if a hearing panel has been utilized, a report of the findings and recommendations of such panel, together with a copy of the transcript. The commissioner's copy shall also include an affidavit of service stating that a copy of such findings and recommendations has been served by regular mail on the certified individual or applicant or the attorney of record of such certified individual or applicant. The findings and recommendations of the hearing officer or, if applicable, the hearing panel shall be based solely upon the record and shall set forth the factual basis therefor.

(g) The findings and recommendations of the hearing officer or if applicable, the hearing panel, shall be final unless an appeal or review proceeding is commenced in accordance with section 83.5 of this Part. In the event that no appeal is taken or review proceeding is commenced, the commissioner shall issue an order implementing any penalty recommended by the hearing officer or if applicable, the hearing panel, as prescribed in section 83.6 of this Part.

§83.5 Appeal.

[Within 30 days after receipt of notification of the findings and recommendations of the hearing officer or hearing panel, the certified individual or applicant may commence an appeal to the commissioner pursuant to subdivision (a) of this section or, where applicable, the commissioner may initiate a review proceeding pursuant to subdivision (b) of this section.]

(a) Appeal by certified individual or applicant. [The certified individual or applicant may commence an appeal of the findings and recommendations of the hearing officer by filing the original appeal papers with the commissioner, with proof of service by regular mail upon the executive director of the Office of Teaching Initiatives. The executive director of the Office of Teaching Initiatives may file a written response with the commissioner within 30 days of being served with such appeal papers, with proof of service by regular mail on the certified individual or applicant or the attorney of record of such certified individual or applicant.]

(1) Within 30 calendar days of the date of service of the findings and recommendations of the hearing officer or if applicable, the hearing panel, upon the certified individual or applicant, exclusive of mailing, if applicable, such certified individual or applicant may appeal the findings and recommendations of the hearing officer or if applicable, the hearing panel. The appeal must be commenced by filing an original and one copy of the appeal papers with the commissioner. The appeal may be filed personally or by mail at the following address:

Commissioner of Education

New York State Education Department

89 Washington Avenue, Room 112, Education Building

Albany, New York 12234

(2) The commissioner shall transmit the copy of the appeal papers to the commissioner's designee.

(3) Within 30 days of the filing of the appeal, excluding the date of mailing and the subsequent four days, if filed by mail, the commissioner's designee may file a written response with the commissioner, along with proof of service by regular mail of a copy of the response on the certified individual or applicant or the attorney of record for the certified individual or applicant.

(b) Review proceeding by commissioner.

[(1) In cases involving convictions for any of the following acts constituting a crime in New York State, the commissioner may initiate review of the findings and recommendations of the hearing officer or hearing panel to determine whether such findings and recommendations should be adopted as the final determination of the commissioner:

(i) the criminal sale, possession or use of marijuana, a controlled substance, a precursor of a controlled substance or drug paraphernalia as defined in article 220 or 221 of the Penal Law; or

(ii) any crime involving physical or sexual abuse of a minor or student; or

(iii) any crime committed either on school property or while in the performance of teaching duties.

(2) Such review shall be commenced by service of a notice of intent to review on the certified individual or applicant or the attorney of record of the certified individual or applicant, by certified mail, return receipt requested. The certified individual or applicant

may file a written response with the commissioner within 30 days of being served with such notice, with proof of service by regular mail on the executive director of the Office of Teaching Initiatives. The executive director of the Office of Teaching Initiatives may file a written response with the commissioner within 30 days of service of such notice, with proof of service by regular mail on the certified individual or applicant. In the event the certified individual or applicant files an appeal on or after the date the commissioner initiates review under this subdivision, the appeal shall be automatically consolidated with the review proceeding and the appeal papers shall constitute the written response of the certified individual or applicant under this subdivision.]

(1) Within 30 calendar days of receipt of the findings and recommendations of the hearing officer or if applicable, the hearing panel, the commissioner may initiate a review proceeding by service of a notice of intent to review on the certified individual or applicant or the attorney of record of the certified individual or applicant, by certified mail, return receipt requested. A copy of such notice shall be transmitted to the commissioner's designee.

(2) Within 30 days of being served with a notice of intent to review the certified individual or applicant may respond by filing an original and one copy of a written response with the commissioner. Such written response may be filed personally or by regular mail at the following address:

Commissioner of Education

New York State Education Department

89 Washington Avenue, Room 112, Education Building

(3) The commissioner shall transmit the copy of the response to the commissioner's designee.

(4) Within 30 days of receipt of the notice of intent to review, the commissioner's designee may file a written response with the commissioner, along with an affidavit of service by regular mail of a copy of the response on the certified individual or applicant or the attorney of record for the certified individual or applicant.

(c) The commissioner shall review any appeal papers, or written responses filed, and the transcript and all evidence presented in the proceeding before the hearing officer [or hearing panel]. Based upon the record, the commissioner may affirm, adopt, reverse, or modify the findings and recommendations of the hearing officer [or the hearing panel], or remand the matter to the extent deemed necessary by the commissioner. If the commissioner determines to deny an application for certification, the commissioner shall communicate that decision to the applicant. If the commissioner determines to revoke or suspend a certificate, or to impose another penalty upon the certified individual as prescribed in section 83.6 of this Part, the commissioner shall execute an order to that effect and shall have the order served upon the certified individual. [If no appeal is taken by a certified individual or applicant within the time prescribed in this section, and no review proceeding has been commenced by the commissioner, the conclusion of the hearing officer or the hearing panel shall be final and in the case of an annulment or suspension of a certificate or the imposition of

another penalty upon the certified individual as prescribed in section 83.6 of this Part, the commissioner shall issue an order to that effect.]

§83.6 Penalties.

(a) . . .

(b) . . .

(c) . . .