



TO: The Honorable the Members of the Board of Regents

FROM: John L. D'Agati *John L. D'Agati*

SUBJECT: Proposed Amendment of Section 87.5 of the Regulations of the Commissioner of Education, Relating to Due Process Procedures for Criminal History Record Checks of Prospective School Employees and Applicants for Certification

DATE: March 12, 2012

AUTHORIZATION(S):

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SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt the proposed amendment to section 87.5 of the Regulations of the Commissioner of Education relating to the elimination of oral argument from the due process procedures for Criminal History Record Checks of Prospective School Employees and Applicants for Certification?

Reason(s) for Consideration

Review of Regents Policy.

Proposed Handling

The proposed amendment is being presented to the full Board for adoption at the March 2012 Regents meeting.

Procedural History

The proposed amendment was discussed by the Higher Education Committee at the January 2012 Regents meeting. A Notice of Proposed Rule Making was published in the January 11, 2012 State Register. A copy of the proposed amendment is

attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Pursuant to section 87.5(5) of the Commissioner's Regulations, a prospective school employee, including an individual who received a conditional or emergency conditional appointment pending the completion of his/her fingerprint supported criminal history background check, who is denied a clearance for employment by the State Education Department as a result of a criminal history record check may appeal that determination to a designee of the Commissioner and may request oral argument as part of the appeal. If requested, oral argument must be provided by the Department.

The proposed amendment would eliminate the provisions concerning oral argument. There is no legal requirement to conduct oral arguments under either the applicable statute (Education Law §3035) or general due process principles, and elimination of oral arguments would not have a significant impact on the appeals process. A review of Department records of Part 87 decisions during a three year period (1/1/08 - 12/31/10) shows that oral arguments were requested in a minority of appeals (48 out of 138 appeals), and that the information received, as a result of an oral argument, was the determinative factor in only 6 such appeals.

Moreover, each oral argument involves the time of the Executive Director of the Office of Teaching Initiatives or her designee, an attorney from Office of Counsel to advise the Executive Director and staff from Office of School Personnel Review & Accountability (OSPRA) to carry out the administrative functions of the oral argument (i.e., scheduling, correspondence, etc.). The considerable amount of Department staff and resources devoted to oral arguments is not sustainable given the budgetary constraints under which the Department must function.

Moreover, even with the elimination of oral arguments, applicants will still have ample opportunity to submit information in support of their applications for clearance for employment. If the Department's Office of School Personnel Review & Accountability (OSPRA) determines that an applicant has something in his/her criminal history record that indicates that there is a basis to deny his/her application for clearance for employment, such as a conviction for an offense that involved a child, it will send the applicant a Notice of Intent to Deny Clearance for Employment (Notice of Intent to Deny). The Notice of Intent to Deny contains the basis for this preliminary determination, including, but not limited to, a description of the criminal charges or the convictions involved. The Notice of Intent to Deny also advises the applicant that his/her application for clearance for employment will be denied unless he/she submits a response, within 25 calendar days from the date that the Notice of Intent to Deny was mailed to him/her, with satisfactory information indicating why he/she should be cleared for employment.

To assist the applicant in preparing such a response, the Notice of Intent to Deny further advises the applicant that his/her response may include any relevant written information that he/she wants the Department to consider. It further provides the applicant with the following non-exhaustive list of information/documentation that he/she

may want to consider submitting with his/her response: (1) any letters of support from friends, family, co-workers, employers, etc.; (2) any documentation attesting to the applicant's good conduct or good character; (3) any written arguments in support of his/her application for clearance for employment; (4) any proof of counseling and/or rehabilitation; (5) any parole and/or probation documentation; (6) any affidavits; or (7) any certificates, including any certificate of relief from disabilities.

If OSPRA determines that there is a basis for denying an application for clearance for employment in cases where the applicant has either failed to submit a response to a Notice of Intent to Deny, submitted an untimely response or submitted a response that does not include satisfactory information indicating why he/she should be cleared for employment, it will send the applicant a Notice of Denial of Clearance for Employment (Notice of Denial). The Notice of Denial will include the basis for the denial and advise the applicant that he/she may appeal the denial to a designee of the Commissioner. The Notice of Denial also includes instructions for filing such an appeal, including, but not limited to, the deadline for doing so.

Additionally, the Notice of Denial advises the applicant that his/her appeal papers may include any affidavits or other relevant written information and written argument, which he/she wishes the Commissioner's designee to consider in support of his/her position that a clearance for employment should be issued. The Notice of Denial also contains the same non-exhaustive list of information/documentation that the applicant may want to consider submitting in support of his/her application for clearance for employment as the Notice of Intent to Deny. It further advises the applicant that the appeal and any information/documentation in support of it must be filed with the Commissioner's designee within 25 calendar days from the date the Notice of Denial was mailed to him/her.

Thus, even with the elimination of the oral arguments, an applicant has an opportunity at each stage of the application for clearance for employment process to submit information and documentation in support of his/her application.

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: that subparagraphs (iii), (iv) and (v) of paragraph (5) of subdivision (a) of section 87.5 of the Regulations of the Commissioner of Education be amended, as submitted, effective April 11, 2012.

Timetable for Implementation

If adopted at the March 2012 Regents meeting, the proposed amendment will become effective April 11, 2012.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Sections 207, 305, 3001-d and 3035 of the Education Law.

1. Subparagraph (iii) of paragraph (5) of subdivision (a) of section 87.5 of the Regulations of the Commissioner of Education is amended, effective April 11, 2012, as follows:

(iii) Such appeal papers, submitted within the timeframes prescribed in subparagraph (i) or (ii) of this paragraph, may include any affidavits or other relevant written information and written argument which the prospective school employee wishes the Commissioner's designee to consider in support of the position that clearance for employment should be granted, including, where applicable, information in regard to his or her good conduct and rehabilitation. [The prospective school employee may request oral argument and must do so in the appeal papers submitted within the timeframes prescribed in subparagraph (i) or (ii) of this paragraph. Such oral argument shall be conducted in accordance with the requirements of subparagraph (iv) of this paragraph.]

2. Subparagraph (iv) of paragraph (5) of subdivision (a) of section 87.5 of the Regulations of the Commissioner of Education is repealed, effective April 11, 2012, as follows:

[(iv) A prospective school employee may request oral argument as part of the appeal of the department's determination denying clearance for employment. The department shall notify the prospective school employee of the time and location of such oral argument. Such argument shall be heard before the Commissioner's designee. At the oral argument, the prospective school employee may present additional affidavits or other relevant written information and written argument which the prospective school employee wishes the Commissioner's designee, to consider in support of the position that clearance for employment should be granted, including,

where applicable, written information in regard to his or her good conduct and rehabilitation. No testimony shall be taken at the oral argument and no transcript of oral argument shall be made. The prospective school employee may make an audio tape recording of the oral argument. However, such audio tape recording or transcript thereof shall not be part of the record upon which the Commissioner's designee makes the determination on whether clearance for employment shall be granted or denied.]

3. Subparagraph (v) of paragraph (5) of subdivision (a) of section 87.5 of the Regulations of the Commissioner of Education is amended, effective April 11, 2012, as follows:

(v) Where a timely request for an appeal is received, upon review of the prospective school employee's criminal history record, related written information obtained by the department pursuant to the review of such criminal history record, written information and written argument submitted by the prospective school employee in this appeal within the timeframes prescribed in subparagraph (i) or (ii) of this paragraph, [and written information provided at oral argument if requested by the prospective school employee,] the Commissioner's designee shall make a determination of whether clearance for employment shall be granted or denied. In such appeal, the Commissioner's designee shall apply the standards for the granting or denial of a license or employment application set forth in Correction Law, section 752 and shall consider the factors specified in Correction Law, section 753. Such appeal shall be conducted in accordance with the requirements of section 296(16) of the Executive Law. Where the determination of the Commissioner's designee is that clearance for employment is denied, his or her decision shall include the findings of facts and conclusions of law upon which the determination is based. A copy of the determination that clearance for employment is denied, or notice that such clearance is

granted, as the case may be, shall be transmitted to the prospective school employee by regular first class mail. In addition, the covered school shall be notified of the denial or granting of clearance.