ARIZONA BOARD OF FINGERPRINTING

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Final Minutes for Public Meeting

Held October 23, 2007, at 9:00 a.m.
3839 North 3rd Street, Suite 107, Phoenix, Arizona

Board Members
Charles Easaw, Department of Education, Chair
Kim Pipersburgh, Department of Health Services, Vice Chair
Rand Rosenbaum, Administrative Office of the Courts
Mike LeHew, Department of Economic Security
Arthur W. Baker, Department of Juvenile Corrections

Executive Director
Dennis Seavers

CALL TO ORDER AND ROLL CALL

Mr. Easaw called the meeting to order at 9:14 a.m. The following Board members were present: Charles Easaw, Kim Pipersburgh, Rand Rosenbaum, and Arthur W. Baker. The following Board member was absent: Mike LeHew.

Also in attendance was Dennis Seavers, Executive Director, and Christopher Munns, Assistant Attorney General.

CALL TO THE PUBLIC

Mr. Easaw made a call to the public. No members of the public were present.

MINUTES

Ms. Pipersburgh made a motion to approve the draft minutes from the August 24 and October 5, 2007 meetings. Mr. Baker seconded the motion, which passed, 4–0.

LEGISLATION

Mr. Easaw referred the Board members to Mr. Seavers's October 19, 2007 memo on legislation for the 2008 session (Attachment 1).

Mr. Easaw asked for discussion and a motion on the issue of continuing the Board beyond its July 1, 2008 sunset.

Mr. Rosenbaum noted that some legislators had requested that the Auditor General's Office conduct an audit prior to the next sunset to review the appropriateness of the statutory factors for considering whether an applicant is rehabilitated. Mr. Rosenbaum asked whether the Board's legislation would need to address that request. Mr. Easaw said that the legislation would not need to address that issue.

Mr. Baker made a motion to pursue legislation to continue the agency for five years. Ms. Pipersburgh seconded the motion, which passed, 4–0.

Mr. Easaw asked for discussion and a motion on the issue of requiring Board employees to have a fingerprint clearance card.

Mr. Baker expressed his belief that Board members should be included in the fingerprint-clearance-card requirement. Mr. Rosenbaum agreed with Mr. Baker but noted that legislators had indicated their preference that only Board employees be fingerprinted. Mr. Easaw said that legislators believed that the appointing agencies should be allowed to appoint the individual those agencies judged to be best suited for a position on the Board. Mr. Baker said that there might be a negative public perception of the Board of Fingerprinting if individual Board members had a conviction for a precluded offense and had not been screened out by a fingerprinting requirement. Mr. Seavers noted that the potential sponsor for the legislation had expressed her preference that the fingerprinting requirement apply just to Board employees. Mr. Seavers recommended that the Board pursue legislation consistent with the legislator's preference.

Ms. Pipersburgh made a motion to pursue legislation to require Board employees to have a fingerprint clearance card, and Mr. Baker seconded. The motion passed, 4–0.

Mr. Easaw asked for discussion and a motion on the issue of the role of the hearing officer.

Mr. Rosenbaum asked how much time the Board would have to submit its legislative proposal. Mr. Seavers replied that state agencies must submit legislative requests by mid-November.

Mr. Baker expressed his concern that the hearing officer who presided at an applicant's hearing and made the decision also would be the person to consider the applicant's request for rehearing or review. Mr. Munns responded that the process for rehearing or review is not really an appeal process; rather, it is process in which applicants can identify what they believe are errors so that the hearing officer can fix the errors and avoid unnecessary, subsequent administrative processes.

Mr. Munns said that the comments and concerns by Board members and legislators seemed to indicate that the best option would be to amend the Board's statutes to specify a process for hearings. He suggested that it would be unwise to develop a new process by the mid-November deadline, particularly because the Board would not have an opportunity to consider all the possible ramifications of the new process.

Mr. Easaw said that returning to the process that existed from February to June 2007 placed too burdensome a workload on the Board members. He reminded Board members that the Board was considering meeting three times monthly rather than every other week because of the heavy caseload. Mr. Easaw also expressed concern about pushing legislation without giving careful thought to the possible effects of the legislation.

Mr. Baker made a motion to adopt the recommendation Mr. Seavers made in his October 19, 2007 memo: that the Board request amendments to its statutes to specify a process for hearings but that the Board not request any changes until the 2009 legislative session so that the Board has time to develop a process. Mr. Pipersburgh seconded the motion, which passed, 4–0.

Mr. Munns recommended that the Board consider legislation to clarify the Board's authority to request information from applicants on whether they have had contact with Child Protective Services ("CPS"). Mr. Munns noted that even if the formal opinion that the Board requested from the Attorney General affirmed the Board's authority, a court would not be bound by the opinion. He believed that clarification through legislation could obviate an adverse ruling from a court.

Mr. Seavers said that it should not be politically difficult to get the change, so long as the legislation would not give the Board direct access to the CPS central registry; he believed that the Department of Economic Security would not want such a proposal considered this soon before the legislative session. He said that the Board could take this issue up at a meeting on November 2, and he and Mr. Munns could research the legislative options before that meeting.

ADJOURNMENT

Ms. Pipersburgh made a motion to adjourn the meeting, and Mr. Baker seconded. The motion passed, 4–0. Mr. Easaw adjourned the meeting at 10:11 a.m.

Minutes approved on November 2, 2007

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Dennis Seavers, Executive Director

Arizona Board of Fingerprinting

Memo

TO: Board members

FROM: Dennis Seavers, Executive Director

C: Christopher Munns, Assistant Attorney General

Date: October 19, 2007

SUBJECT: Legislation for 2008 session

At its October 23, 2007 meeting, the Board will be discussing and adopting a legislative proposal. This memorandum offers information on what options the Board has for legislation and enumerates the actions the Board must and may take at the October 23 meeting.

SUMMARY

At the least, the Board must adopt proposed legislation to continue the agency beyond its July 1, 2008 termination date. (See Section A below.) In addition, the Board should consider a legislative proposal that addresses issues that legislators discussed at the Board's October 3, 2007 sunset hearing. Specifically, the two issues discussed were: (1) requiring Board employees, but not Board members, to have a fingerprint clearance card, and (2) clarifying or changing the role of the hearing officer in making final decisions on good-cause-exception applications. (See, respectively, Sections B and C below.)

A. SUNSET

Under A.R.S. § 41–3008.18(A), the Board of Fingerprinting terminates on July 1, 2008. For the Board to be continued, the Legislature must pass a bill to extend the agency's date of termination. At the October 3 sunset hearing, the committee of reference recommended that the Board be continued for five years (i.e., until July 1, 2013).

The Board must approve a legislative proposal to continue the agency for five years.

B. FINGERPRINTING BOARD EMPLOYEES

As discussed in the October 5, 2007 Board meeting, Rep. Jerry Weiers suggested that Board employees be required to have a fingerprint clearance card. Sen. Linda Gray, the chairman of the committee of reference, agrees that Board employees should have fingerprint clearance cards. Sen. Gray indicated that she did not believe Board members should be required to have fingerprint clearance cards, since the agencies that appoint the Board members presumably select suitable candidates for membership on the Board.

I recommend that the Board approve a legislative proposal to require Board employees to have fingerprint clearance cards as a condition of employment. Since this legislative change has the

support of the chairman of the committee of reference and our probable legislative sponsor, Sen. Linda Gray, the Board should not reject the proposal for fingerprinting Board employees.

C. ROLE OF HEARING OFFICER

In previous Board meetings and at the sunset hearing, there was much discussion of the recent *Baker* decision, which says that the hearing officer makes the final decision when the Board delegates a hearing officer to conduct an administrative hearing. The committee of reference shares the Board's concern about the hearing officer, rather than the Board, making the final decision. The Board should consider these concerns and decide whether to adopt a legislative proposal to alter the Board's good-cause-exception process following an expedited review.

In addition to the concerns about the hearing officer making the final decision, Sen. Linda Gray also expressed concern about returning to the process that the Board had adopted in February 2007. (For more information about this process, please see the February 9, 2007 minutes, which are available at www.azbof.gov/meetings.htm.) Under this process, there were two hearings: an evidentiary hearing (i.e., the hearing at which the hearing officer asks questions, considers evidence, and takes testimony from the applicant or others) and the meeting at which the Board would consider the hearing officer's recommendation. For each hearing, the applicant was entitled to receive at least 20 days notice. Thus, it would take at least 40 days (and almost always longer) for the applicant to receive a decision following the expedited review. Sen. Gray believed that this 40-day time frame was a long time for applicants—specifically, teachers—to wait for a decision.

The Board has three options it could pursue: (1) leave the process as it is, (2) return to the February 2007 process, or (3) amend the Board's statutes to specify a process for hearings. Each of these options and their advantages and disadvantages are discussed below.

Since the Board has expressed a preference to change the current process, I would recommend that the Board select the third option—amending the Board's statutes to specify a process for hearings. This option may allow the Board to avoid some caseload and timeliness problems, which are discussed below. However, I would recommend that the Board not make any changes in the next legislative session and instead leave the current process in place. During the next year, the Board can develop a new process. Waiting one year will give the Board sufficient time to consider the impact of changes and avoid the problems that might occur by rushing to develop a new process without taking time to consider the ramifications of the new process or without getting input from stakeholders. Board members should note that by adopting this recommendation, the current process will remain in place for nearly two years; legislation to create a new process would be introduced in the 2009 session and would not be effective until the 2009 general effective date (probably August or September 2009).

1. Take no action

The Board could decide that it does not want to propose legislation to change the process. With this option, the Board would be leaving the process unchanged. The hearing officer would

continue to make the final decision in cases where the Board delegated a hearing officer to conduct the administrative hearing.

Advantages

The current process is efficient and faster than another process would be. There is not a delay between the time the recommendation is filed and the Board makes a decision. Instead, the hearing officer files an order, without having to wait for the next Board meeting or without having to give the applicant notice. The current process is also less cumbersome administratively. It does not require notices of hearing or preparation of information for Board meetings.

Disadvantages

Board members have expressed concerns about the current process. (The Board should note that it has discussed these concerns but not formalized them through a motion. However, there appeared to be consensus among the members about these concerns at the August 24, 2007 meeting.) Among other concerns, Board members believe it is unwise to cede decision-making authority to a hearing officer. In particular, Board members are concerned that the Board has no control over decisions the agency makes once a case is referred to a hearing and a hearing officer is delegated. Board members have expressed a concern about the possibility for inconsistent decisions; Board members believe that a five-member entity is likelier to make consistent decisions than a single decision maker.

The committee of reference expressed similar concerns. Evan solely as a political consideration, to address the concerns of the committee of reference, the Board might want to alter the current process.

2. Return to the February 2007 process

The Board could amend its statutes so that the hearing officer does not make the final decision. The Board could propose legislation that makes it clear that the hearing officer only offers a recommendation.

Under this option, Article 6 of the Administrative Procedures Act ("APA") would apply. The Board would be obligated to return to a process similar or identical to the one the Board adopted at its February 9, 2007 meeting.

Advantages

This option would address the Board's concerns about the role of the hearing officer. It would also make use of an existing administrative-hearing process because Article 6 of the APA would apply.

Disadvantages

This option would not address Sen. Linda Gray's concern about the wait time necessitated by giving the applicant proper notice of the evidentiary hearing and the hearing at which the Board decides whether to accept the hearing officer's recommendation.

In addition, Board members had begun expressing concern about their caseload. Members had suggested that the Board might need to meet three times a month rather than every other week in order to keep up with the influx of hearing-officer recommendations and expedited-review cases. The concern about caseload might come up again if the Board were to return to its old process.

3. Create a new process

The Board could propose legislation to exempt it from both Article 6 and Article 10 of the APA. (The Board is currently exempt from Article 10. As a result of this exemption, Article 6 applies to the Board's process.) The Board could specify a process for hearings in its statutes.

Advantages

This option would address both the Board's concerns about the role of the hearing officer and Sen. Gray's concern about timeliness.

Disadvantage

The Board could adopt a process that has unintended consequences. This issue is especially problematic because the Board will not have had much time to consider and develop a process by the time that proposed legislation must be submitted. (However, the Board could opt to keep the current process for one year while it spends time developing a new process. The Board could then propose legislation for the 2009 session.) In addition, legislators may be tempted to amend the legislative proposal. If the amendments have unintended consequences, as they sometimes do, the Board could be stuck with a problematic process until the next legislative session.

To the knowledge of our assistant attorney general ("AAG"), no other agency has its own process outlined in statute and is exempted from both Article 6 and Article 10 of the APA. If the Board specifies its own process in statute, it may be taking unprecedented action, and the AAG's ability to advise the Board may be limited, since there will not have been a history of court rulings to drawn on for legal advice.

Finally, the concern described above (see "Return to the February 2007 process") would not be address by this option.

Rehearing or review

The Board has discussed the possibility of having the hearing officer make the decision on cases, with the process for rehearing or review reserved to the Board. The process for requesting a rehearing or review is a means for the decision maker to identify problems or errors that

materially affected the rights of the applicant; it should not be thought of as an appeal. Since this process is meant to correct errors or problems in the initial decision, the request for rehearing or review must be considered and acted on by the decision maker. If the decision maker was the hearing officer, then the hearing officer, and not the Board, would consider the request for rehearing or review.

The Board could instead consider appeals of cases that the hearing officer denied. This option appears to be what the Board was considering when it discussed having the hearing officer make decisions and having the Board consider requests for rehearing or review. However, unless the Board had some mechanism for winnowing the number of cases eligible for appeal to the Board, most or all applicants would take advantage of the appeal. The issue that the Board was trying to address by considering this option—namely, reducing the Board's caseload—would remain. In addition, this option has the same disadvantages as any other change to the current process, especially the possibility of unintended consequences.