



ARIZONA BOARD OF FINGERPRINTING

Mail Code 185 • Post Office Box 6129 • Phoenix, Arizona 85005-6129
Telephone (602) 265-0135 • Fax (602) 265-6240

Final Minutes for Public Meeting

Held September 2, 2011, at 9:30 a.m.

3839 North 3rd Street, Suite 107, Phoenix, Arizona

Board Members

Charles Easaw, Department of Education, Chairperson
Ellen Kirschbaum, Administrative Office of the Courts
Mike LeHew, Department of Economic Security
Kim Pipersburgh, Department of Health Services
Matthew A. Scheller, Department of Juvenile Corrections

Executive Director

Dennis Seavers

CALL TO ORDER AND ROLL CALL

Mr. Easaw called the meeting to order at 9:30 a.m. The following Board members were present: Charles Easaw, Brad Willis, and Kim Pipersburgh. The following Board members were absent: Ellen Kirschbaum. (There is currently no Board member representing the Department of Juvenile Corrections.)

Also in attendance was Dennis Seavers, Executive Director.

CALL TO THE PUBLIC

Mr. Easaw made a call to the public. There were no members of the public who wished to speak.

APPROVAL OF MINUTES

Mr. Easaw asked that the draft minutes from the August 19, 2011 meeting be considered at the next Board meeting.

INTERIM WORK PERMITS

Mr. Easaw referred the Board members to Mr. Seavers's August 23, 2011 memo on interim work permits (see Attachment 1).

Will Humble, Director of the Department of Health Services, spoke to the Board about his agency's reasons for requesting that the Board issue interim work permits. He described the process his agency has established to determine which employees to recommend for an interim work permit.

Ms. Pipersburgh said that it would be most efficient to delegate authority to issue interim work permits to the executive director. Mr. Seavers asked that the Board allow him to communicate about the status of interim work permits with the applicants' employers, particularly to let them know if the good-cause-exception application is denied and the interim work permit is no longer valid. Mr. Willis made a motion to approve Mr. Seavers's proposal for delegating interim-work-permit authority to the executive director and to allow the Board staff to communicate with employers about the status of interim work permits. Ms. Pipersburgh seconded the motion, which passed 3-0.

EMPLOYEE COMPENSATION

Mr. Willis made a motion for the Board to go into executive session for the purpose of discussing employee compensation under A.R.S. § 38-431.03(A)(1). Ms. Pipersburgh seconded the motion, which passed 3-0. The Board entered executive session at 9:40 a.m.

The Board emerged from executive session at 10:00 a.m. Mr. Willis made a motion to establish the executive director's salary at \$72,000 per year. Ms. Pipersburgh seconded the motion, which passed, 3-0.

ADJOURNMENT

Mr. Willis made a motion to adjourn, and Ms. Pipersburgh seconded. The motion passed, 3-0. Mr. Easaw adjourned the meeting at 10:01 a.m.

Minutes approved on October 14, 2011

Dennis Seavers, Executive Director



Arizona Board of Fingerprinting Memo

TO: Board members
FROM: Dennis Seavers
C:
Date: August 23, 2011
SUBJECT Interim work permits

At the Board's September 2, 2011 meeting, the Board will be considering whether to issue interim work permits under specific circumstances. The Department of Health Services (DHS) has asked the Board to consider issuing the permits to avoid a negative consequence that arises from recent legislation. This memo describes the issue that DHS has identified, summarizes the background of the Board authority to issue interim work permits, and outlines options for the Board.

SUMMARY

- DHS has identified a legitimate need to retain employees who otherwise would not be able to work at the Arizona State Hospital while the good-cause-exception process was pending.
- The Board can address DHS's need by issuing interim work permits to a specific class of applicants without having the permit-issuance process from becoming a major function of the Board.
- This memo proposes a process for issuing interim work permits. This process includes delegation of the decision-making authority to the executive director because the decision would be essentially administrative rather than substantive. The memo also identifies other options for the Board.
- If the Board adopts the process proposed in this memo, the impact on the Board would be minimal.

BACKGROUND

This portion of the memo provides some background on (1) the legislation that led to DHS's request and (2) the interim work permits.

Arizona State Hospital

Laws 2011 (First Regular Session), Chapter 177 (Senate Bill 1025), §1, requires employees and volunteers of the Arizona State Hospital (ASH), which is a part of DHS, to have a level I fingerprint clearance card. The bill became effective on July 20, 2011. DHS has determined that the bill applies to existing employees who had already been employed at ASH prior to the effective date of the bill.

DHS has begun receiving denials from DPS for employees who, according to the DHS director, have good work histories and whose criminal offenses occurred many years ago and are only tangentially related to their work at ASH. The DHS director also indicated that, given the nature of the work at ASH, it is difficult to recruit clinical staff and that DHS does not want to lose excellent employees.

DHS has asked the Board to exercise its statutory authority to issue interim work permits (described below) for the class of employees who were already working at ASH and whom DHS wants to continue employing.

Interim work permits

Laws 2000 (Second Regular Session), Chapter 251 (SB 1407), §19, amended A.R.S. § 41-619.55 to allow the Board to issue interim work permits. The relevant portion of the statute, currently A.R.S. § 41-619.55(I), states, "Pending the outcome of a good cause exception determination, the board or its hearing officer may issue interim approval in accordance with board rule to continue working to a good cause exception applicant."

The Board's minutes from 1999 and 2000 and the available legislative record don't clearly indicate the purpose of this provision, but it appears to have been part of clean-up efforts that addressed operational issues after the fingerprint-clearance-card system was first established. (Based on my discussions with individuals who were Board members at the time, I understand that the interim work permit may have been used later as a measure to limit the impact of a growing backlog of hearings, particularly in 2001 and 2002.)

In 2000, the Board adopted guidelines for issuing interim work permits.¹ To qualify for an interim work permit, an applicant had to meet the following requirements.

- The applicant's criminal history could only include one of the following:
 - A single arrest or conviction that was at least three years old;
 - Multiple offenses of different types, with the most recent offense at least five years old;
 - Multiple offenses of the same type, with the most recent offense at least 10 years old.

¹ I'm providing this information solely for background for the Board. Please note that I would not recommend that the Board adopt criteria similar to these, in large part because the Board has a different and more efficient application process.

- The applicant's criminal history could not include arrests or offenses that involved bodily harm, physical violence, or use of a weapon.
- The applicant could not be awaiting trial;
- The applicant had to have completed all sentencing terms
- The applicant could not have misrepresented any criminal-history information on any forms required by the Board;
- The applicant had to submit the following documentation:
 - Good-cause-exception application
 - Court documents or police records related to the offense (or records that court documents were no longer available)
 - Evidence that the applicant met all requirements imposed by the court
 - Personal account of the incident
 - Criminal-history affidavit
- The applicant's employer had to submit a notarized letter recommending an interim work permit;
- The Board member representing the agency that regulated the applicant's area of work had to recommend the interim work permit. For example, if the applicant wanted to be a teacher, she could not get an interim work permit unless the Board member representing the Department of Education recommended her.²

The Board's records from 2000 are unclear, but minutes from one meeting suggest that Board considered allowing the executive director to determine whether to issue an interim work permit based on the Board's guidelines. The final policy adopted by the Board did not indicate whether this proposal was adopted. In addition, Board records suggest that the interim work permits were valid only for a specific period of time.³ Although it's unclear how long the permits were valid for prior to 2002, the Board adopted a policy on June 19, 2002, specifying that permits were valid until the shorter of one of the following occurred:

- The Board held a good cause exception hearing (at the time, the Board's final decision was made at a hearing, and the Board didn't use hearing officers);
- The Board approved an application under an expedited review,
- One year expired.

Although interim work permits may have been used between 2000 and 2002, by the time I began working for the Board (then on assignment from the governor's office) in August 2002, the Board was not issuing the permits (or at least it issued them so rarely that I can't remember them being issued). The Board has not issued an interim work permit in at least seven years, and probably longer. The Board's records don't indicate how many interim work permits were issued between 2000 and 2002.

² At the time, the only regulating agencies that required fingerprint clearance cards were the ones represented on the Board.

³ When I began working for the Board, I saw some records for which interim work permits had been issued, and the permits had expiration dates.

DISCUSSION AND RECOMMENDATIONS

DHS is requesting that the Board issue interim work permits for people who have been working at ASH—in some cases, for an extended period of time—in positions that are difficult to fill because of the nature of the work. By issuing interim work permits, the Board would allow individuals who are already working at ASH to continue working, and only on the recommendation of the employing agency. DHS will take responsibility for vetting the employees it recommends for interim-work-permit approval; in fact, the director himself will be responsible for issuing the recommendations to the Board. Moreover, the Board would have to issue only a limited number of permits for ASH employees. DHS estimates that there will be about 40 to 50 total requests.

I would respectfully recommend that the Board try to accommodate DHS's needs. DHS has a legitimate need to retain personnel, and it would be relatively easy for the Board to implement a process; I've proposed an option below that would avoid a caseload increase for the Board. In addition, the Board can adopt a policy on interim work permits that limits the circumstances under which permits are issued so that this function of the Board doesn't become too large.

Proposed process

An interim work permit would be issued only in the following circumstances.

- The applicant is part of a class of people who:
 - Have to get a fingerprint clearance card for a job due to newly effective legislation;
 - Held that job at the time the legislation was effective;
 - Previously did not have to get a fingerprint clearance card.

The Board would not be able to adopt a process for issuing interim work permits just for ASH employees recommended by DHS. However, the Board could adopt a process for issuing permits for a class of people similar to the ASH employees. By defining a narrow class of people who would be eligible for interim work permits, the Board can avoid having the permit process from becoming too burdensome for the Board.

- The applicant receives a recommendation from the employing agency that requires a fingerprint clearance card. This requirement ensures that the employing agency wants the person to continue working while the good-cause-exception process is pending.
- The employing agency would need to have a legitimate legal basis for requiring the fingerprint clearance card. This requirement avoids a situation where the Board would issue interim work permits for employees of organizations that start requiring fingerprint clearance cards but that aren't permitted under law to require fingerprint clearance cards.
- The applicant has submitted an application, even if incomplete, to the Board. Under its statute, the Board can only issue interim work permits to applicants. To meet this definition, the Board will need to have received at least the application form. If the application is incomplete, the Board could still issue an interim work

permit, and the applicant wouldn't lose his or her job while trying to meet the Board's numerous and burdensome (though justifiable) application requirements.

- The applicant is not precluded from receiving a fingerprint clearance card under A.R.S. §§ 41-1758.03(B) or -1758.07(B). This requirement would prevent the Board from issuing an interim work permit to an individual who isn't eligible to receive a good cause exception.

Under the proposed requirements above, the Board wouldn't need to think of the interim work permit in the same way as it thinks of the expedited-review process. For expedited reviews, the Board is making a substantive determination of whether an applicant is rehabilitated and not a recidivist. With my proposal for interim work permits, the Board is simply allowing people to work who already are working in the regulated profession, who have the support of the employing agency, and who ultimately will still need to be approved for a good cause exception by the Board.

Although there would only be about 40 or 50 requests from DHS for interim work permits, I know the Board may be concerned about increasing its already high caseload at Board meetings, especially if in the future a larger group of applicants qualifies to be considered for interim work permits.⁴ Therefore, I would recommend that the Board delegate the authority to issue interim work permits to the executive director, who would be required to following the guidelines established by the Board. If the Board adopts my proposed requirements, then the criteria for granting a permit would be objective rather than subjective: either DHS recommends the permit, or it doesn't; either the applicant submitted an application form, or he didn't; either the applicant is eligible to request a good cause exception, or she isn't. These criteria are clear and straightforward and therefore are appropriate for delegation to the executive director. The decision would effectively be administrative, rather than the sort of substantive decision that would be better for the Board to make. Also, if the Board delegates responsibility to the executive director, he can issue the permits on an ongoing basis, rather than applicants having to wait for the next Board meeting (or for the agency to have to place the applicants on administrative leave).

Other options

Additional requirements for interim work permits

The Board could have additional requirements for an interim work permit than the ones described above. However, if the Board's requirements are so rigorous that they essentially duplicate the requirements for a complete application, then the process for considering requests for interim work permits would either differ only slightly from the expedited review or would have little benefit for the employing agency.

⁴ Under my proposal, this would occur if future groups were added to the fingerprint-clearance-card system, and the employing agencies wanted to keep their current employees. However, this circumstance could be avoided if the Board's lobbyist (the executive director) encourages the agency to include a grandfathering provision in the legislation.

For instance, the Board could consider issuing an interim work permit at the same it conducts an expedited review—after the applicant has submitted a complete application. This option would allow an applicant to continue working while waiting for the outcome of a hearing. However, the option would not address the underlying reason for an agency like DHS requesting a process for issuing interim work permits.

Whether to delegate authority to the executive director

The Board could itself decide whether to issue interim work permits rather than delegating responsibility to the executive director. If the Board has additional requirements for an interim work permit than the ones I recommend above, then this option may be appropriate for the Board, particularly if the additional criteria are substantive rather than administrative. However, this option would affect the Board's caseload at its biweekly meetings.

Miscellaneous

- The Board could issue interim work permits for more applicants than just the narrow class in my proposal above. However, before doing so, the Board should consider its caseload and the need for a more complex tracking process, which in turn could require costs for database improvements.
- The Board could decline to issue interim work permits.
- Before considering whether to issue an interim work permit, the Board could require applicants to have submitted additional documents as part of the application package than just the application form.

Additional issues to consider

Voting requirement

If the Board decides to issue interim work permits itself (rather than delegating decision-making authority to the executive director), approval of the permit would only require a simple majority. The Board's supermajority requirement only applies to good-cause-exception approvals.

Period of validity for interim work permits

If the Board issues an interim work permit, the permit would remain in effect until the Board makes a final decision on the good-cause-exception application. The statute giving the Board authority to issue interim work permits states that the permit would be effective "[p]ending the outcome of a good cause exception determination" The Board's attorney has advised that "determination" refers to a final decision by the Board and not just an intermediate decision at an expedited review (unless the Board approved the application at an expedited review).

If the Board were to deny the good-cause-exception application, the interim work permit would remain in effect until the time period for requesting a rehearing or review had passed or, if the applicant requests a rehearing or review, until the Board made a decision on the request.

The Board should not follow the apparent practice from 2000–2002 of issuing interim work permits that had specific periods of validity because the statute specifies that the permits are valid until a final decision is made.

Revocation of interim work permits

If the Board issues an interim permit, the Board may not be able to revoke the permit if new, problematic information were discovered after the permit is issued. However, this circumstance is unlikely to occur if the Board only issues interim work permits for the narrow class of people described in my proposal above.

Reporting requirements

If the Board agrees to delegate responsibility to the executive director for issuing interim work permits, the Board should, as a good management practice, establish reporting requirements from the executive director. These reporting requirements would allow the Board to retain oversight over the process. Reports could include information such as number of permits issued, ratio of good-cause-exception applications ultimately approved among the cases for which the Board issued permits, and the basis for issuing the permits (if the permit process extends beyond ASH employees).

Administrative rule

The statute refers to board rule for issuing interim work permits. Ideally, the Board should establish a rule if the Board begins issuing interim work permits. However, there are restrictions on the ability of some agencies to adopt new rules, and the governor's office may have intended for an agency like the Board of Fingerprinting to abide by a rulemaking moratorium. The Board may not be able to adopt a rule until this or another gubernatorial administration alters its stance on rulemaking.