

MEMORANDUM

TO: All Attorneys

FROM: Colleen K. Nissl, Chief, Administrative Agencies Section

DATE: March 25, 1981

RE: Notice required under Chapter 119., Ohio Revised Code, for denial of licensure or entrance to an examination.

There have been a number of questions recently concerning the procedures a licensing body is required to follow under Sections 119.06 and 119.07, Ohio Revised Code when it denies an application for licensure or denies an applicant admission to a licensure examination.

Our research into this question has indicated that when Sections 119.06 and 119.07, Ohio Revised Code are read together with a number of judicial due process holdings, there is significant doubt as to whether a denial of licensure or admission to an examination will be upheld upon appeal to the courts in the absence of an opportunity for a prior hearing. Further, since the thirty day limit for requesting a hearing set forth in Section 119.07, Ohio Revised Code, applies only to requests for prior hearing, there is also significant doubt as to the finality of an administrative agency order denying licensure or admission to an examination if the only opportunity for hearing occurs after such denial. For these reasons, I have concluded that the adherence to the procedure set forth below should minimize the risk that an agency order will be overturned on appeal and should further minimize the risk that an agency will be required to hold a post denial hearing after the denial where an individual has not requested a prior hearing, but has appealed a denial to court. I am requesting that you transmit this memo to the licensing agencies you advise, along with any additional interpretation or advise you find necessary in light of the particular statutes creating such agencies.

1) Where a licensing board will be refusing licensure or admission to an examination, notice that the board is proposing to deny the application for licensure or examination should be given to the applicant in conformity with the requirements of Section 119.07, Ohio Revised Code. As you know, Section 119.07, Ohio Revised Code, requires that notice be given by registered mail, return receipt requested and that the notice given inform the party of the reasons for such proposed action, the law or rule directly involved and of the fact that he is entitled to a hearing if he requests it within thirty days of the time the notice was mailed. Section 119.07, Ohio Revised Code further requires that the party be informed by the Notice of his right to present evidence, examine witnesses, be represented, etc., and of the fact that the board may take final action denying the application if a hearing is not requested within thirty days. This summary of the requirements of Section 119.07, Ohio Revised Code, is not intended to be comprehensive, since, as you know, Section 119.07, Ohio Revised Code, sets a number of other specific requirements. A sample notice complying with Section 119.07, Ohio Revised Code, is attached for your reference.

2) Where an applicant requests a hearing upon receipt of the notice, scheduling of such hearing should be in conformity with the requirements of Section 119.07, Ohio Revised Code. A sample scheduling letter is attached. Under certain circumstances, a board may wish to inform the applicant in the scheduling letter of the scope of such hearing. For example, if it has been proposed to deny licensure because an applicant failed to achieve a passing score on the examination, this letter might inform the applicant that the hearing will be limited to the issue of whether the applicant achieved a passing score on the examination. After the hearing, the board would issue an adjudication making findings of facts, conclusions of law and an order. If the order is a denial, it must conform to Section 119.09, Ohio Revised Code, and contain the language informing the applicant of his right to appeal to court. In the event of an appeal to court, the board must timely certify its record as required by Section 119.12, Ohio Revised Code.

3) Where the applicant does not request a hearing within thirty days of the board's notice proposing to deny the application, the board should then issue an order to deny the application. Since the denial is not issued after an evidentiary hearing, it should not make findings of fact and conclusion of law. A sample denial order is attached. Please note that such denial order should inform the applicant that the denial may be appealable to court pursuant to 119.12, Ohio Revised Code. However, if an appeal to court is filed by the applicant, a motion to dismiss for failure to exhaust administrative remedies should be made to the court, since it is the applicant's failure to request a hearing before the board that makes it impossible for the court to perform its function of reviewing the evidence in the record under Section 119.12, Ohio Revised Code. Sample motions to dismiss on this basis are available. Note also, however, that in the event of such an appeal, the board should comply with the requirements of Section 119.12, Ohio Revised Code, by timely certifying to the court a record comprised of all the documents concerning the board's action, while noting to the court that there is no transcript nor any exhibits since the applicant did not request a hearing.

I. Sample Notice of Proposal To Deny Application For
Licensure or Examination

You are hereby advised that at its meeting on _____, 1981, the
_____ Board proposed to deny your application for ("licensure as a
_____ " or "admission to the _____ licensure examination").

The reason for this proposal is that:

Insert here both the factual reason for the conduct and the
legal basis for denial. For example:

"Your application for admission to the examination indicates
that you lack the educational requirements for examination
referred by Section 47 __. __, Ohio Revised Code."

or

"The score you obtained on the October, 1981, licensure
examination was 74, which is below the 75 score required to
pass the examination under Rule _____, Rules of the
State Board of _____."

or

"It has been alleged that July 21, 1980, you were convicted of
a felony offense by the Court of Common Pleas of Adams
County. Under the terms of Section 47 __. __, Ohio Revised
Code, the State Board of _____ is authorized to refuse
to issue or renew a license or to revoke or suspend a license
where a majority of the members of the board find an
applicant or registrant guilty of a felony or gross immorality."

In accordance with Chapters 119. and 47 __, Ohio Revised Code, you are further
advised that if you request a public hearing within thirty (30) days of the mailing of this
letter, you are entitled to such on the question of whether or not
_____.

If you desire a public hearing, such request must be mailed to the State Board of
_____, (address), within the thirty (30) day period. If you fail to timely
request such a hearing, the State Board of _____ may proceed to determine your
eligibility for licensure/admission to examination solely on the basis of the foregoing.

You are further advised that you may appear at such hearing in person, by your
attorney, or you may present any position, arguments, or contentions in writing, and that
at this hearing you may present evidence and examine witnesses appearing for and against
you.

BY ORDER OF THE STATE BOARD OF _____.

John Doe, Executive Director

II. Sample Scheduling Letter

The State Board of _____ is in receipt fo your letter dated _____ requesting a hearing in accordance with Chapter 119, Ohio Revised Code to determine whether your application for _____ should be denied.

You are hereby advised that purusant to Sections 119.07 and 119.08, Ohio Revised Code, the State Board of _____ hereby schedules your adjudication hearing for _____ (insert a date within fifteen days request received but at least seven days after request received.) However, upon its own motion in order to more efficiently conduct its business, this board hereby postpones your hearing pursuant to Sections 119.08 and 119.09, Ohio Revised Code until _____. Thus you are hereby advised that your adjudication hearing is now scheduled for (time, place).

John Doe, Executive Director

In the case of an individual who has failed an examination, some boards might want to consider adding language like:

Please be advised that under Rule _____, Rules of the State Board of _____, all applicants for licensure as a _____ must achieve a score of _____. The Board is not authorized to waive this requiremnt. Accordingly, you are advised that the scheduled hearing will be limited to the issue of whether you achieved a score of _____. If you do not wish to pursue a hearing, please notify this office in writing no later than _____.

III. Denial Where No Hearing Was Requested

This matter came on for consideration upon the application of _____ for licensure (or examination) as a _____.

On _____, 1981, notice was given to _____ that the State Board of _____ had proposed to deny his/her application for licensure (or examination) as a _____ and that he/she was entitled to a hearing if such hearing was requested within thirty (30) days of the mailing of said notice.

The next paragraph will depend upon whether the denial is based upon a lack of qualifications demonstrated by the application or upon allegations of misconduct. If the former, something like, "A review of the application you submitted indicates that you have not completed the educational requirements necessary for licensure (or examination). Accordingly, your application for licensure (or examination) is hereby denied."

or

"You failed to achieve a score of 75 as required by Rule _____, Rules of the State Board of _____. Accordingly, your application for licensure is hereby denied."

or

"Based upon your failure to establish your qualification for licensure, the State Board of _____ hereby denies your application on the basis of the allegations against you set forth in the notice given to you on _____, 1981.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Such an appeal may be taken to the Court of Common Pleas in the county in which your place of business is located or to said court of the county in which you reside. If you are not a resident of and have no place of business in Ohio you may appeal to the Court of Common Pleas in Franklin County. Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of a Notice of Appeal with the State Board of _____ and the appropriate court within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12 of the Ohio Revised Code.

BY ORDER OF THE STATE BOARD OF _____.

John Doe, Executive Director