

**HOUSE BILL 770 -  
CHANGES TO CRIMINAL HISTORY REVIEW STANDARDS**

House Bill 770 makes a number of changes to G.S. § 93B-8.1, including to the standards by which the Board must review applicants' criminal histories, and applies to all applications filed on October 1, 2019, or thereafter.

If an individual, who applied prior to October 1, 2019, wants his/her criminal history assessed using the revised G.S. § 93B-8.1, they must reapply.

**A. The Board May No Longer Automatically Deny Licensure Based Upon Criminal History Except If The Crime Is Directly Related To The Licensee's Responsibilities; or the Crime Was Violent Or Sexual In Nature.**

G.S. § 93B-8.1(b) previously provided that "[u]nless the law governing a particular occupational licensing board provides otherwise, a board shall not automatically deny licensure on the basis of an applicant's criminal history." This previously effective language permitted the Board to have the automatic holdback/delay provisions contained in 21 NCAC 68 .0216, as that is valid law that "provides otherwise."

House Bill 770 changed G.S. § 93B-8.1(b) to read: "Unless federal law governing a particular board provides otherwise, a board may deny an applicant on the basis of a conviction of a crime only if the board finds that the applicant's criminal conviction history is directly related to the duties and responsibilities for the licensed occupation or the conviction is for a crime that is violent or sexual in nature."

Since there is no federal law governing the Board's licensing requirements, House Bill 770 effectively means that the Board may only automatically deny licensure based upon a prior criminal conviction if the conviction history is (1) directly related to the licensee's responsibilities, or (2) the conviction is for a crime that is violent or sexual in nature.

**1. The Provision Permitting Automatic Denial For Crimes Directly Related To The Licensee's Responsibilities Will Be Difficult To Apply.**

It may be difficult to determine when a criminal conviction is directly related to the licensee's responsibilities, particularly given that G.S. § 93B-8.1(b) now provides: "[n]otwithstanding any other provision of law, a board shall not automatically deny licensure on the basis of an applicant's criminal history, and no board may deny an applicant a license based on a determination that a conviction is a crime of moral turpitude."

The Board should rarely determine that a particular crime is "directly related" to the licensee's responsibilities.

**2. The Provisions Permitting Automatic Denial For A Crime That Is Violent Or Sexual In Nature Will Not Be Difficult To Apply.**

It should not be difficult to determine, in almost all cases, whether or not a crime is violent or sexual in nature.

**B. If The Applicant's Criminal History Does Not Permit Automatic Denial, The Board Must Consider Each Applicant's Criminal History Individually.**

House Bill 770 modified G.S. 93B-8.1(b1) such that, if the Applicant's criminal history is not such that the Board can automatically deny licensure, the Board must consider each applicant on an individual basis, considering the following factors:

- (1) The level of seriousness of the crime.
- (2) The date of the crime.
- (3) The age of the person at the time of the conviction.
- (4) The circumstances surrounding the commission of the crime, if known.
- (5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
- (6) The person's prison, jail, probation, parole, rehabilitation, and employment records since the date the crime was committed.
- (6a) The completion of, or active participation in, rehabilitative drug or alcohol treatment.
- (6b) A Certificate of Relief granted pursuant to G.S. 15A-173.2.
- (7) The subsequent commission of a crime by the applicant.
- (8) Any affidavits or other written documents, including character references.

The factors that the Board must consider, with respect to each applicant's criminal history, are very similar to those that the Board is already required to consider under G.S. § 90-113.46A.

The primary impact of House Bill 770, on the standard by which the Board must consider an applicant's criminal history, is to do away with the Category system set forth in 21 NCAC 68 .0216, and (with a few exceptions) require the Board to consider each applicant's criminal history on an individual basis.

**HOUSE BILL 770 -  
APPLICATION PROCEDURAL CHANGES**

House Bill 770 makes a number of changes to G.S. 93B-8.1 that will require changes to the way that the Board processes applications. The Board should proceed as follows:

- 1. Conduct a criminal background check.** § 90-113.46A requires all applicants for

registration, certification or licensure by the Board to consent to a criminal records check, and, obviously, the Board should require each applicant to consent to a criminal background check, and then conduct the check.

**2. Provide a copy of the criminal history to applicant.** G.S. 93B-8.1(b4) specifically provides that the Board require the provider of the criminal record to provide the applicant with access to the criminal history record, or provide a copy to the applicant.

If the applicant requests a copy, the Board must provide a copy.

If the applicant does not request a copy, but the Board might deny or delay licensure based upon the criminal history, the Board must provide a copy anyway (see procedural note 3).

Given that our contract with the SBI does not permit the Board to provide a copy of the criminal history to our applicants, the Board probably needs to contact the SBI and modify the contract, or get the SBI to agree that we can provide criminal histories that it provides to our applicants.

**3. Give the applicant a chance to supplement criminal history.** If the criminal history includes matters that might cause the Board to deny licensure, the Board must provide a copy of the criminal history to the applicant, with a letter informing the applicant that the criminal history is such that the Board might deny licensure; and that the applicant has 30 days to provide information correcting any inaccuracy, or submitting evidence of mitigation or rehabilitation.

The letter should require the applicant to provide information relevant to all of the factors identified in G.S. 93B-8.1(b1).

The first time we have such a case, I will draft a letter to the applicant, which the Board could thereafter use as a template.

**4. How to determine if the Board will or might deny licensure.** In making that call, I recommend that the person processing the application tell applicants who would have been barred from proceeding under the "Category" structure set forth in 21 NCAC 68 .0216 , that the Board might deny licensure.

In particular, although the Board is no longer entitled to reject any application on a *per se* basis, the fact that an applicant would have previously been rejected under the *per se* rule is a good guideline as to the kinds of situations where the Board "might deny licensure".

**5. Consideration by the Quality Assurance Committee.** The Quality Assurance Committee should consider each application after the applicant has been given a opportunity to supplement its application to address the applicant's criminal history.

If the QA Committee determines that the application can proceed, that should be the end of the analysis.

If the QA Committee determines that the application should be denied, the matter should be referred to the full Board for consideration.

**6. The Board should consider applications that the QA Committee would reject.** If the QA Committee would reject an application, the Board should conduct a hearing at which the application is considered. The Board should give notice to the applicant and permit the applicant to appear and be heard. Matters outside the application should not be considered at hearing.

**7. The Board should enter a written order.** If the Board approves the application, the Order can be brief. If the Board denies the application, it must make written findings and explain its decision; the Board President must sign; the applicant must be provided with a copy within 60 days; and the applicant should be told about the appeal process and when the applicant is eligible to reapply if the appeal is denied.

## **HOUSE BILL 770 - OTHER CHANGES**

House Bill 770 contains other noteworthy changes/requirements, including the following:

**1. Application And Website Information.** The Board is required to include in its application for licensure, and on its public website, the following information:

- a. That applicants are required to consent to a criminal records check.
- b. A list of the factors that the Board will consider if the criminal record check discloses any criminal history (those are the factors in G.S. 93B-8.1(b1), set forth above.
- c. A description of the appeals process if the application is denied.

If you have any written instructions that are provided to the applicants, you should provide me with a copy and I will propose changes to the same.

**2. A potential applicant can seek a pre-determination with respect his/her criminal history.** A potential applicant may pay \$45.00 and seek a predetermination of whether his/her criminal history would likely disqualify them from obtaining a license.

If someone seeks a pre-determination, they must ask for the criminal history; provide a criminal history from a Board approved provider (the SBI if they will consent); provide any other information that the Board might consider under G.S. 93B-8.1(b1); and pay \$45.00.

The Quality Assurance Committee (after the Board authorizes them to act on its behalf

in regard to reviews) should review the criminal history and other provided, and let the applicant know if the criminal history would likely disqualify them.

The Quality Assurance Committee would have 45 days after submission to consider the application for predetermination.

If the Quality Assurance Committee determines that the potential applicant would not be denied, that determination is binding on the Board.

If the Quality Assurance Committee determines that the potential applicant would likely be denied, it would need to notify the applicant in writing which would (a) explain the reasons for its predetermination; (b) inform the petitioner that he/she could move forward anyway, and have the Board consider its application at the appropriate time; and © inform the applicant that evidence of rehabilitation would be considered if he/she chose to pursue application.

With respect to each of the new letters described above, when you get to the first, I will draft the same and you can use the draft as a template.

If you have any questions about these matters, please let me know.

Very truly yours,

HARRIS & HILTON, P.A.



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