

DEPARTMENT OF SAFETY AND HOMELAND SECURITY
OFFICE OF THE SECRETARY
Statutory Authority: 11 Delaware Code, Section 1448A(k) (11 Del.C. §1448A(k))

FINAL

ORDER

101 Regulations Governing the Relief from Disabilities Board

I. NATURE OF THE PROCEEDINGS

Pursuant to its authority under 11 Del.C. §1448A(k), the State of Delaware, Department of Safety and Homeland Security (hereinafter "Department") proposed new regulations as they relate to the creation and operations of the Relief from Disabilities Board and the transmission of health information to NICS pursuant to 11 Del.C. §1448A(k). The Department published the proposed rules and regulations on March 1, 2012 and accepted comments from the public until April 1, 2012.

II. PUBLIC COMMENT

The Department received the following public comments in response to its notice of intention to adopt the proposed regulations and offers the following responses thereto:

- A public comment was received expressing concerns that 11 Del.C. §1448A(k) and the proposed rules and regulations inappropriately discriminates against persons with mental illnesses who are no more prone to violent crime than persons without mental illness. After meeting with the commenters, all parties recognized the need to maintain the public safety as it relates to firearms and that the federal and state law addresses that need. The commenters further recognized that 11 Del.C. §1448A(k) and the proposed regulations balances promoting and protecting the public safety, while also providing persons with mental illness who are persons prohibited under federal and state law, but who are not a threat to themselves or others, a forum to seek and obtain relief from that status through a due process hearing.
- A public comment was received requesting that a member of the Delaware Consumer Recovery Coalition be allowed to serve on the Relief from Disabilities Board. Title 11, §1448A(k) of the Delaware Code specifically mandates that the Relief from Disabilities Board be comprised of three (3) members, one from the Department of Safety and Homeland Security and two (2) from the Department of Health and Social Services, one of whom shall be a Delaware licensed psychiatrist. The Department declines to amend the rules and regulations to the extent they are consistent with the mandate set forth in 11 Del.C. §1448A(k).

III. FINDINGS AND CONCLUSIONS

Based on the comments received, the Secretary of the Department of Safety and Homeland Security finds that any comments and/or amendments made in response thereto do not change the intent or meaning of these proposed regulations. Therefore, based on the foregoing, the proposed regulations shall be adopted.

IV. ORDER

AND NOW, this 15th day of May, 2012 it is hereby ordered that:

The proposed regulations are adopted;

The text of the proposed regulations shall be in the form attached as Exhibit A;

The effective date of this Order is ten (10) days from the date of publication in the Delaware *Register of Regulations* in accordance with 29 Del.C., §10118(e) and,

The Department reserves unto itself the authority to issue such other and further orders concerning its practices and procedures as may be just and proper.

IT IS SO ORDERED.

BY: Lewis D. Schiliro, Secretary

Department of Safety and Homeland Security

DATED: 5-15-12

101 Regulations Governing the Relief from Disabilities Board

1.0 Purpose.

- 1.1 To establish rules and regulations for the Relief from Disabilities Board, a forum for persons subject to the disabilities of 18 U.S.C. §§ 922(d)(4) and (g)(4) and/or of 11 Del.C. §1448(a)(2) because of an adjudication or commitment to seek relief from a firearms prohibition.
- 1.2 To provide proper and adequate due process to those persons seeking relief from a firearms prohibition arising strictly from a disability under 18 U.S.C. §§ 922(d)(4) and (g)(4) and/or 1 Del.C. §1448(a)(2).
- 1.3 To allow for the expeditious modification or correction of a person's record who is no longer subject to a firearms prohibition under 18 U.S.C. §§ 922(d)(4) and (g)(4) and/or 1 Del.C. §1448(a)(2).
- 1.4 To ensure the confidentiality and security of records and data provided pursuant to 11 Del.C. §1448A.

2.0 Scope and Applicability

- 2.1 Authority. These regulations are promulgated pursuant to 11 Del.C. §1448A(k). These regulations shall be known as "Regulations Governing the Relief from Disabilities Program and Use of Data Pursuant to 11 Del.C. §1448A".
- 2.2 Applicability. These regulations apply to persons who are prohibited from carrying, possessing, owning or transferring firearms as it relates to 18 U.S.C. §§ 922(d)(4) and (g)(4) and/or of 11 Del.C. §1448(a)(2) due to an adjudication or commitment to a hospital, mental institution or sanitarium as a result of a mental disorder.

3.0 Definitions.

The following words, phrases, and terms as used in these regulations shall have the meanings stated below:
"Adjudication or commitment to a hospital, mental institution or sanitarium as a result of a mental disorder" means a person admitted under a provisional admission by a psychiatrist or under a civil court order to the custody of the hospital for observation, diagnosis, care and treatment pursuant to 16 Del.C. Ch. 50. It does not include persons transported and held for mental health screening and assessment.

"Board" means the Relief from Disabilities Board hereby created by 11 Del.C. §1448A(j) and these regulations.

"Dangerous instrument" means any instrument, article or substance which is readily capable of cause death or serious physical injury as defined in 11 Del.C. §222(4).

"Deadly weapon" means any object which is or can be used, or attempted to be used, to cause death or serious physical injury as defined in 11 Del.C. §222(5).

"DELJIS" means the Delaware Criminal Justice Information System.

"Disability(ies)" means a prohibition from possessing, owning and/or transferring firearms as it relates to 11 Del.C. §1448(a)(2) and 18 U.S.C. §§ 922(d)(4) and (g)(4).

"DSCYFS" means the Department of Services for Children, Youth and Their Families.

"DHSS" means the Department of Health and Social Services.

"DSHS" means the Department of Safety and Homeland Security.

"Firearm" means any weapon as defined in 11 Del.C. §222(12).

"NICS" means National Instant Criminal Background Check System.

"Notice of De Novo Judicial Review" means written timely notice to the Superior Court and to the Board that a Petitioner, who has been denied relief after a hearing before the Relief from Disabilities Board, intends to appeal for a de novo review of the Board's decision by the Superior Court.

"Official record" means any and all documents, including but not limited to transcripts, evidence, testimony, etc., which has been submitted and presented to the Board for consideration during a hearing on a Petition for Relief.

"Person prohibited" means any person prohibited from purchasing, owning, possessing or controlling a deadly weapon or ammunition for a firearm within the State pursuant to 11 Del.C. §1448(a)(2) and 18 U.S.C. §§922(d)(4) and (g)(4).

4.0 Confidentiality and Security of Data.

- 4.1 The DHSS, DSHS, DSCYF and DELJIS shall adhere to 42 C.F.R. Part 2; 45 C.F.R. Parts 160, 162, and 164; and 16 Del.C. §1232 in protecting the confidentiality of protected patient health information in the use and discussion of protected patient health information and in the transmission of this information to the NICS database.

4.2 DELJIS shall adhere to 11 Del.C. Chapters 85 and 86 in protecting the confidentiality of criminal justice records and protected patient health information in the use of such information and in its transmission to the NICS database.

5.0 Relief from Disabilities Board

5.1 Creation.

- 5.1.1 The Relief from Disabilities Board is hereby created to carry out the functions and duties pursuant to 11 Del.C. §1448A(j) and these regulations.
- 5.1.2 The Board is authorized to consider petitions for relief pursuant to 11 Del.C. §1448A(j) and these regulations arising from mental health adjudications or commitments which occur in the State of Delaware.
- 5.1.3 All legal processes and all documents required by law to be served or filed with the Board shall be served or filed with the Chairperson of the Board at the Department of Safety and Homeland Security, 303 Transportation Circle, Dover, Delaware 19901.
- 5.1.4 Personal service or Service by Certified First Class Mail shall be considered proper service or filing.
- 5.1.5 Service shall be considered complete upon receipt by the Chairperson, or by a person authorized by the Chairperson to accept service, of a Notice of De Novo Judicial Review and all documents as required by section 4.2.2. of these regulations.
- 5.1.6 All official records of the Board or affidavits by the Chairperson as to the content of such records shall be prima facie evidence of all matters required to be kept by the Board.
- 5.1.7 The Board is not a designated agency pursuant to the Administrative Procedures Act and, therefore, shall be subject only to 29 Del.C. §10161(b).
- 5.1.8 The Board shall adhere to 42 C.F.R. Part 2; 45 C.F.R. Parts 160, 162, and 164; and 16 Del.C. §1232 in protecting the confidentiality of protected patient health information in the use and discussion of protected patient health information and in the transmission of this information to the NICS database.
- 5.1.9 Pursuant to 11 Del.C. §1448A(j), the Board shall be comprised of three (3) members, with the Chairperson appointed by and serving at the pleasure of the Secretary of Safety and Homeland Security and the remaining two (2) members appointed by and serving at the pleasure of the Secretary of the Department of Health and Social Services, one of whom shall be a Delaware licensed psychiatrist.

5.2 Procedure.

- 5.2.1 All three Board members must be present to hear a petition for relief and a simple majority shall constitute the decision of the Board.
- 5.2.2 The petition shall contain, at a minimum, the following:
 - 5.2.2.1 The Petitioner's name, address and telephone number;
 - 5.2.2.2 The Petitioner's mental health record;
 - 5.2.2.3 A certificate from a medical doctor or psychiatrist licensed in this State that the person is no longer suffering from a mental disorder which interferes with or handicaps the person from handling deadly weapons and/or firearms;
 - 5.2.2.4 A notarized affidavit signed by the Petitioner stating that the facts and statements contained in the petition are true and correct.
 - 5.2.2.5 Any and all documents the Petitioner wishes to introduce or submit to the Board in support of his or her case.
- 5.2.3 The Board shall schedule a hearing on a petition for relief within 60 days from the date of receipt of the petition.
- 5.2.4 Pursuant to Section 4.1.5 of these regulations, a petition for relief shall be heard by the Board in a closed and confidential hearing on the record.
 - 5.2.4.1 The record of the hearing shall be maintained by the Chairperson at DSHS for a period of one year from the date of the hearing for purposes of de novo judicial review.
- 5.2.5 The Board shall consider evidence as specified in 11 Del.C. §§1448A(j)(2) and (3). In accordance with 11 Del.C. §1448A(j)(3), the Board may request that the petitioner undergo a clinical evaluation and risk assessment at the recommendation of the Board psychiatrist and if a majority of the Board agrees. The petitioner shall bear the costs of his or her clinical evaluation and/or risk assessment.
- 5.2.6 Relief shall be granted if the Board finds, by a preponderance of the evidence:
 - 5.2.6.1 The Petitioner will not likely act in a manner dangerous to public safety; and,
 - 5.2.6.2 Granting the relief will not be contrary to the public interest.
- 5.2.7 The decision of the Board shall be issued in writing explaining its reasons for a denial or grant of relief.

5.2.8 The decision of the Board shall be issued as soon as practicable following the hearing.

6.0 Modification of Petitioner's Record.

6.1 Upon notice that a petition for relief has been granted, the Department of Health and Social Services and the Department of Children, Youth and Their Families shall notify the Attorney General of the United States and shall update, correct, modify or remove from the database it maintains and makes available to NICS to reflect that the petitioner is no longer subject to a firearms prohibition as it relates to 11 Del.C. §1448(a)(2) and 18 U.S.C. §§ 922(d)(4) and (g)(4). Pursuant to 11 Del.C. §1448A(j)(7), DSHS shall be responsible for ensuring compliance with this regulation.

6.2 DELJIS shall also update, correct, modify or remove any reference to the petitioner's disability as it relates to 11 Del.C. §1448(a)(2) and 18 U.S.C. §§ 922(d)(4) and (g)(4) to reflect that the petitioner is no longer subject to a firearms prohibition under 11 Del.C. §1448(a)(2) and 18 U.S.C. §§ 922(d)(4) and (g)(4).

7.0 De Novo Judicial Review of the Decision of the Board.

7.1 Any person whose petition for relief has been denied by the Board shall have a right to a de novo judicial review in the Superior Court.

7.2 A petitioner shall file a Notice of De Novo Judicial Review in Superior Court within 30 days from the date the Board rendered its decision. The petitioner shall also file within 30 days of such decision a copy of the Notice of De Novo Judicial Review with the Board by serving the Chairperson, or a person designated to receive service on behalf of the Chairperson, at the Department of Safety and Homeland Security, 303 Transportation Circle, Dover, DE 19901.

7.3 The Board shall provide a copy and transcript of the record and hearing to the Superior Court within 30 days from its receipt of the copy of the Notice of De Novo Judicial Review.

7.4 The De Novo Judicial Review hearing shall be scheduled to be heard by the Superior Court within 30 days of receipt of the record and transcript of the Board hearing.

7.5 Pursuant to 11 Del.C. §1448A(j), the Superior Court shall consider the record of the Board hearing on the petition for relief, the decision of the Board, and, at the Court's discretion, any additional evidence it deems necessary to conduct its review.

7.6 The Superior Court shall issue its decision setting forth the basis to grant or deny the Petitioner's De Novo Judicial Review within a reasonable time after the De Novo Judicial Review hearing has been held. A copy of the Superior Court's decision shall be sent to the Petitioner and the Board.

7.7 If the Superior Court grants Petitioner's Notice of De Novo Judicial Review, the Board shall, as soon as practicable, notify DELJIS, DSCYF and DHSS, which shall update, correct, modify or remove any references to the person's disability from any database maintained and made available to NICS to reflect that the petitioner is no longer a person prohibited from owning, possessing and/or transferring firearms as it relates to 11 Del.C. §1448(a)(2) and 18 U.S.C. §§ 922(d)(4) and (g)(4). In addition, DHSS shall notify the Attorney General of the United States that the Petitioner is no longer subject to a firearms prohibition pursuant to 11 Del.C. §1448(a)(2), 18 U.S.C. §§ 922(d)(4) and (g)(4). Pursuant to 11 Del.C. §1448A(j)(7), DSHS shall be responsible for ensuring compliance with this regulation.