

considerable resources. Further, such regrades require release of both the questions and Model Answers. In turn, release of the questions and answers necessitates preparation of new examinations twice each year. Producing new examinations twice each year requires dedication of considerable resources. The Office is already pressed for staff and time to provide these services. The Office intends to change the delivery of the registration examination. The examination would no longer be administered twice a year in a paper and pencil format. Instead, a private sector party would deliver the examination at computer terminals at that party's test sites. It is anticipated that the examination would be administered each business day. The examination would not be delivered to applicants on the Internet. The registration examination is and will continue to be a multiple choice examination. The Office intends to develop a databank of multiple choice questions in following years that can be reused in subsequent examinations. The source of the questions and answers would be the patent laws, rules and procedures as related in the Manual of Patent Examining Procedure (MPEP) and policy statements issued by the Office. The examination would be "open-book" in the sense that the MPEP and policies would be accessible at the same computer terminals where the examination is taken. Paper forms of the MPEP or policies could not be brought into the private sector party's test site. New questions would be introduced as MPEP revisions or policy statements introduce new policies, rules, procedures, or statutory law changes. The USPTO would announce when questions are added to the data base addressing revisions of the MPEP or new policy statements. Questions would be retired as necessary and consistent with the changes. Reuse of questions could reduce the time and resources needed to develop the examination each time it is given. To reuse questions and reduce pressure on the staff, it would be necessary to cease publication of the questions and the corresponding answers. This would preserve the fairness of the test for later applicants.

The Multistate Bar Examination (MBE), like the registration examination, is a multiple choice examination. Questions on the MBE are reused in later years. An individual may review on his own MBE examination papers under the guidelines established by the National Conference of Bar Examiners, *i.e.*, under supervision and without taking notes. *See Fields v. Kelly*, 986

F.2d 225, 227 (8th Cir. 1993). Under proposed paragraph (g), an unsuccessful applicant would schedule an opportunity to review, *i.e.*, inspect the examination questions and answers he or she incorrectly answered under supervision without taking notes. The questions could not be copied. This would be the same as the guidelines established by the National Conference of Bar Examiners for inspection of the MBE.

Under proposed paragraph (e), an unsuccessful applicant satisfying the admission requirements would have a right to sit for future examinations. The due process clause of the Fourteenth Amendment does not require that unsuccessful applicants be given the opportunity for a regrade. The applicant is afforded due process by permitting him or her to sit for the examination again. *See Lucero v. Ogden*, 718 F.2d 355 (10th Cir. 1983), *cert. denied*, 465 U.S. 1035, 79 L. Ed. 2d 706, 104 S.Ct. 1308 (1984) ("Courts have consistently refrained from entering the arena of regrading bar examinations when an unqualified right of reexamination exists."); *Tyler v. Vickery*, 517 F.2d 1089, 1103 (5th Cir. 1975), *cert. denied*, 426 U.S. 940, 49 L. Ed. 2d 393, 96 S.Ct. 2660 (1976); *Poats v. Givan*, 651 F.2d 495, 497 (7th Cir. 1981); *Davidson v. State of Georgia*, 622 F.2d 895, 897 (5th Cir. 1980); *Sutton v. Lionel*, 585 F.2d 400, 403 (9th Cir. 1978); *Whitfield v. Illinois Board of Bar Examiners*, 504 F.2d 474, 478 (7th Cir. 1974) (Constitution does not require an unsuccessful applicant be permitted to see his examination papers and to compare them with model answers or answers of successful applicants); *Bailey v. Board of Law Examiners*, 508 F.Supp. 106, 110 (W.D. Tex. 1980); and *Singleton v. Louisiana State Bar Ass'n.*, 413 F.Supp. 1092, 1099–1100 (E.D. La. 1976).

Limiting access to the questions would not deny the unsuccessful applicant equal protection of the laws. Inasmuch as some of the questions appear in following years, the questions must be kept secret in order to preserve the fairness of the test for later applicants. *See Fields v. Kelly*, 986 F.2d at 227. An unsuccessful applicant also is not deprived of a property right without due process by limiting access to the questions. Providing an opportunity to review the examination under supervision without taking notes affords the applicant a hearing at the administrative level. *Id.* at 228.

The Administrative Procedures Act provides procedural protections in matters involving an "adjudication," which includes licensing. 5 U.S.C. 554.

However, the Act also provides that these protections are not required where there is involved "proceedings in which decisions rest solely on inspections, tests, or elections \* \* \*." 5 U.S.C. 554(a)(3). This subsection implicitly recognizes that "where examinations are available, further procedural protections are unnecessary. *See also* 1 K. Davis, *Administrative Law Treatise* § 7.09 (1958)." *Whitfield v. Illinois Board of Bar Examiners*, 504 F.2d 474, 478 (7th Cir. 1974).

Paragraph (f) of § 11.7 would continue the current practice in which applicants seeking reciprocal recognition under § 11.6(c) must file an application and pay the fee set forth in § 1.21(a)(6). It would introduce the practice of paying the application fee required by § 1.21(a)(1)(i).

Paragraph (g) of § 11.7 would continue the practice of soliciting information bearing on the moral character and reputation of individuals seeking recognition. If information from any source is received that tends to reflect adversely on the moral character or reputation of an individual seeking recognition, the OED Director would conduct an investigation into the individual's moral character and reputation.

The proposed regulation specifies that the information sought bearing on the moral character and reputation of individuals includes events regardless of whether the records have been expunged or sealed by a state court. In accordance with the supremacy clause of the United States Constitution, "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Louisiana Public Service Comm'n. v. FCC*, 476 U.S. 355, 369, 90 L. Ed. 2d 369, 106 S.Ct. 1890 (1986). The pre-emptive force of a Federal agency's regulation does not depend on express Congressional authorization. Instead, the correct focus is on "the proper bounds of [the Federal agency's] lawful authority to undertake such action." *City of New York v. FCC*, 486 U.S. 57, 64, 100 L. Ed. 2d 48, 108 S.Ct. 1637 (1988).

Congress has authorized the USPTO Director to adopt regulations requiring individuals to demonstrate that they are of good moral character and reputation before being recognized. 35 U.S.C. 2(b)(2)(D). The statute does not mention expungement as a means for removing statutory disqualifications. Congress does not appear to have contemplated these expungements would limit the USPTO Director's authority under statute. Requiring disclosure of expunged offenses is a rational and