

EDUCATION

ALERT

HIRING AND CRIMINAL BACKGROUND REPORTS

For Pennsylvania schools, hiring season for the fall is well underway. As school administrators evaluate candidates, it is worthwhile to consider what they must, should and should not do related to the criminal background checks mandated by 24 P.S. §1 111.

Under that law, schools are not permitted to employ individuals, either directly or through contractors, if the person is ineligible because of the applicant's criminal history conviction record. An applicant is either ineligible for life – using a specific list of criminal offenses – or, where the offense fits into particular grading categories, for defined periods after the sentence ends. Further, the defined periods are different depending on how the offense was graded.

Interpreting the criminal record (which can be incomplete) can be challenging and, where the person is only ineligible for a defined period, so can determining when the person's sentence ended. Yet, administrators have a vested interest in getting it right – the statute contains severe penalties for administrators who employ an ineligible person.

There are tools to assist administrators when trying to figure out if someone is ineligible. Foremost is online court information that Pennsylvania and some others jurisdictions make freely available. Using such tools, one can usually confirm the specific charge, the grading and also determine when the sentence ended. That being said, reading and interpreting the FBI reports and the court records from various jurisdictions takes practice and can be time consuming.

To make matters even more complicated, the Commonwealth Court recently ruled that blind application of the lifetime ban is unconstitutional, at least in some cases. In the case discussed, the court held that laws impacting a person's ability to perform certain work must be rationally related to fulfilling a legitimate governmental purpose. PDE had argued that the "purpose" was to maintain a safe learning environment in schools. However, the court found that the thirty year old manslaughter conviction – where the man exhibited good behavior and work record since then – did not impact the safety of students. Because of that, and although the law was not generally unconstitutional, it was unconstitutional as applied to that person because it violated that employee's "substantive due process."

Since that time, PDE has interpreted the court's rationale as also applying to the defined periods of ineligibility.¹

Thus, when applying the statute, and before disqualifying a potential employee for any conviction, the administrator is supposed to also assess whether the nature of the offense impacts on the governmental interest – safety of the school environment. Because of the potentially high penalty against administrators for being wrong, it is almost always preferable to err on the side of caution and deny employment where there is no clear track record of rehabilitation.

Moving away from the School Code, employers also need to be careful not to run afoul of general

employment laws that state a government agency “may not summarily reject an individual's employment application on the ground that the individual has a prior criminal record, unless in doing so the government is furthering a legitimate governmental goal.”² This simply reinforces the requirement to consider further evidence of rehabilitation and suitability for the position sought.

Beyond that, if an administrator decides to disqualify an applicant for a prior conviction, there is a notice requirement in Pennsylvania law. Specifically, under the PA Criminal Records Act, that administrator must tell the applicant in writing that the decision not to hire was based in whole or in part on criminal history record information. If the applicant wishes to supply information to demonstrate rehabilitation in response, that should be considered.

But Pennsylvania law is not the only one that applies here, and just like the Commonwealth Court case, these other laws further erode the false security of the bright line rule found in §1-111 of the School Code. Foremost are the Equal Employment Opportunity Commission (EEOC) and the Pennsylvania Human Relations Commission (PHRC), which are concerned with the disparate impact on minorities if criminal records are used in a discriminatory manner. Therefore, under their reasoning, by using criminal convictions as a basis for

(not) hiring, such employers are engaging in Title VII barred racial discrimination.

Despite the position of these other agencies, a school administrator cannot simply ignore the clear mandate in the statute. PDE’s guidance is scant and contradictory, but in its most recent writing, helpfully calls upon school administrators to determine if “application of §1-111 to an individual would violate the Pennsylvania Constitution” and in making that determination to “consider the nature of the offense as it relates to student safety and the person’s suitability for school employment, when the offense occurred, and the person’s current position.” It goes on to give a laundry list of other items to consider and then requires that any determination that application of §1-111 would be unconstitutional “must be supported by a written opinion from the school’s legal counsel.” This is actually helpful since a legal opinion can provide a safe harbor between the procedural “rock” (student safety) and the “hard place” (no discrimination) of contrasting public policies.

If you have any questions about the information contained in this Alert, please contact the author A. Kyle Berman at aberman@foxrothschild.com or 610.397.7980 or any member of Fox Rothschild’s [Education Law Practice](#).

1 <http://tinyurl.com/pqtef4f>

2 *Hunter v. Port Authority of Allegheny County*, 419 A.2d 631, 35 (Pa. Cmwlth. 1980)



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