



**Department of
Civil Service**

Disqualification Considerations & the Use of Background Investigations: The Roles and Responsibilities of a Municipal Civil Service Agency

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I. Introduction

This manual will provide an overview of the role of the municipal civil service agency in the process of disqualifying a candidate for appointment pursuant to Civil Service Law and Rules, as well as the process of evaluating and verifying if a candidate meets the requirements for appointment through the use of a background investigation.

Municipal civil service agencies are faced with balancing the interests of employers in hiring the most suitable candidate while ensuring the process is “open and fair” for individuals competing for public sector jobs. Municipal civil service agencies bear the responsibility to bring the maximum number of qualified people into the selection process to carry out the constitutional mandate of merit and fitness “through competition.” This mandate supports municipal civil service agencies’ efforts to “screen in” qualified applicants.

Civil Service Law and Rules also place the responsibility on municipal civil service agencies to “screen out” unqualified candidates. Civil Service Law and Rules provide the basis upon which disqualification decisions can be made pursuant to §50(4) of Civil Service Law. Only the municipal civil service agency has the authority to make this final determination. As part of this process, civil service agencies can use background investigations as a tool to assist them in obtaining the information necessary to make the decision to qualify or disqualify a candidate.

The employer's interest in hiring the right employee has grown for many reasons, including the time and money invested in training the employee and the public perception of the agency that the employee will represent. Neglectful hiring is also a growing concern. Employers are increasingly being held accountable for the misconduct of their employees if the courts determine they were negligent in their hiring practices. Employers want to mitigate employment liability for hiring an unqualified employee. As a result, there has been an increasing demand to investigate the background of candidates for appointment. Background investigations will be discussed in more detail in the pages that follow.

Both appointing authorities and candidates will hold the civil service agency accountable and may challenge any decisions to disqualify or qualify candidates for appointment. Therefore, objective and well-documented procedures and reasons for all decisions to qualify or disqualify candidates will minimize problems and aid in defending challenges.

For all of these reasons, a detailed review of a candidate's qualifications for appointment is necessary. Municipal civil service agencies must be involved in the process because Civil Service Law places the statutory responsibility for making disqualification determinations and providing due process to disqualified candidates on civil service agencies, not appointing authorities.

II. Legal Basis

As mentioned, Civil Service Law and Rules provide the basis upon which a municipal civil service agency can make a disqualification decision. The legal framework for disqualification is provided in Civil Service Law, §50, subdivision 4. In addition, the Text of each local civil service agency's Rules contains a provision on Disqualification. In the coming pages, §50(4) of the Civil Service Law, its subsections, as well as the Disqualification Rule as outlined in this Department's *Model Municipal Civil Service Rules* at https://www.cs.state.ny.us/msd/msdonline/pdf/manuals_guides/model_municipal_civil_service_rules_03_07.pdf (password required), will be outlined and discussed.

§50(4) of Civil Service Law

Under the provisions of §50(4), a municipal civil service agency may refuse to examine any applicant, or after examination may refuse to certify a successful candidate as eligible for appointment provided the applicant:

- (a) is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies; or
- (b) is found to have a disability which renders him or her unfit to perform in a reasonable manner the duties of the position in which he or she seeks employment, or which may reasonably be expected to render him or her

unfit to continue to perform in a reasonable manner the duties of such position; or

(d) has been guilty of a crime; or

(e) has been dismissed from a permanent position in the public service upon stated written charges of incompetency or misconduct, after an opportunity to answer such charges in writing, or who has resigned from, or whose service has otherwise been terminated in, a permanent or temporary position in the public service, where it is found after appropriate investigation or inquiry that such resignation or termination resulted from his incompetency or misconduct, provided, that in cases of dismissal, resignation, or termination after written charges of incompetency, the examination or certification in question be for a position that requires the performance of a duty or duties which are the same as or similar to the duty or duties of the position from which the applicant has been dismissed, resigned or terminated on account of incompetency; or

(f) has intentionally made a false statement of any material fact in his application, or

(g) has practiced, or attempted to practice, any deception or fraud in his application, or in his examination, or in securing his or her eligibility or appointment; or

(h) who has been dismissed from private employments because of habitually poor performance.

(a) Disqualification based on the failure to satisfy the established requirements

Meeting the minimum qualifications constitutes the first screen in the appointment process, so it is important that the established minimum qualifications be clear. In most cases, applicants are disqualified under §50(4)(a) of Civil Service Law because they do not meet some particular requirement for admission to the exam or for appointment to the position. This would include candidates who do not demonstrate they possess the required education, experience, residency, age or other special requirement. This provision is extremely broad and disqualification may be based on the established minimum qualifications or any bona fide requirement for appointment, which could include statutory or regulatory requirements for appointment.

Municipal civil service agencies have great authority not only in establishing minimum qualifications but, most significantly, in interpreting them. “Wide discretion is afforded to civil service commissions in determining the fitness of candidates. The exercise of that discretion is to be sustained unless it has clearly been abused. It is a function of the Civil Service Commission to fix a fair and reasonable standard by which may be tested the qualifications of

applicants for appointment in the civil service. The exercise of that function may be the subject of a judicial review only in the event of a clear showing that in fixing the test of fitness the action by the Commission was arbitrary, capricious or unreasonable.”¹

“It is well-settled law that the Civil Service Commission may inquire into the character and reputation of applicants for public employment and exclude from such civil service of the State or municipality any person it deems unfit to occupy a public position by reason of...want of character, experience,...or a lack of proper disposition, or the existence of habits which would render him quite unfit to assume the duties of the position.”² “The disqualification or removal of a person’s name from the eligible list for a public employment must have as its basis sound logic and reasoning rather than mere arbitrary, discriminatory, or capricious presumption.”³

(b) Disqualification Based Upon a Disability

The provisions of the Civil Service Law should be applied consistent with the requirements of the Americans with Disabilities Act (ADA) and the Human Rights Law.

¹ Cowen v Reavy, 283 NY 232 (1940).

² Haynes v. Brennan, 16 Misc. 2d 13 135 (1954)

³ ibid.

State and federal law prohibit employers from making any pre-employment disability-related inquiries of an applicant. Both the Americans with Disabilities Act of 1990 (ADA) and the New York State Human Rights Law, prohibit employers from refusing to hire a qualified individual with a disability because of such disability. Further, both the ADA and the Human Rights Law require employers to provide a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability to enable such individual to perform the duties of the position sought, unless the accommodation would impose an undue hardship on the operation of the employer's business.

Americans with Disabilities Act of 1990

The ADA prohibits any disability-related inquiries before an offer of employment has been made. However, an employer may inquire about an applicant's ability to perform job-related functions, with or without reasonable accommodation. Additionally, an employer may ask applicants to describe or demonstrate how they would perform the functions of the positions sought, with or without reasonable accommodation. When an employer knows that an applicant has a disability, either because it is obvious or the applicant has voluntarily disclosed the existence of a disability, an employer may ask the applicant to demonstrate or describe how he or she would perform the duties of the position sought. However, if an employer does not believe that a known

disability will interfere with an applicant's ability to do the job, the employer may not ask the applicant to describe or demonstrate how he/she would perform the duties of the job, **unless** all applicants are requested to do the same.

For further guidance in this area, see *Enforcement Guidance: Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990*, issued by the U.S. Equal Employment Opportunity Commission, May 19, 1994.

The ADA requires employers to focus on the essential functions of the position sought in determining whether an individual with a disability is qualified. In general, the essential functions include the fundamental job duties of the position, and do not include marginal functions.

The ADA also prohibits an employer from requiring a pre-offer medical examination. An employer may require a medical examination, after an offer of employment has been made, only if all applicants are required to undergo a medical examination. Therefore, if you have a question as to whether an applicant can perform the essential duties of a position, you may not require him/her to undergo a medical examination unless there are established physical-medical requirements for the position and/or all applicants who are offered employment are required to undergo a medical examination.

In making a determination as to whether the applicant or eligible is able to perform the duties of the position sought, remember that the ADA requires an employer to focus on the essential duties of the position sought.

Further, with respect to a disqualification based on a future inability to perform the duties of the position, the ADA prohibits an employer from refusing to hire an otherwise qualified individual with a disability based upon speculation that the disability may cause a risk of future injury. There must be a significant, current risk of substantial harm to health or safety.

The obligations and prohibitions of the ADA and the Human Rights Law extend only to qualified individuals with disabilities. A qualified individual with a disability includes an individual with a disability who meets all the skills, experience, education and other job-related requirements of the position sought, and who, with or without reasonable accommodation, can perform the duties of such position.

Under the ADA, an individual with a disability is defined as an individual with a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

The definition of disability under the Human Rights Law is significantly broader and includes a physical, mental or medical impairment resulting from anatomical, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or

laboratory techniques; a record or such an impairment; or a condition regarded by others as such an impairment.

Municipal civil service agencies should discuss with their legal counsel the limitations and requirements imposed by the ADA and/or the Human Rights Law before taking action to disqualify an applicant or eligible under §50(4)(b) of the Civil Service Law.

(d) Disqualification based on Criminal Convictions

Civil Service Law, §50(4)(d) provides that municipal civil service agencies may disqualify applicants or eligibles who have been “guilty of a crime.” A crime constitutes conviction of a misdemeanor or a felony. Further, guilt of a crime does not mandate disqualification from employment. The municipal civil service agency may refuse to examine or after examination to certify as eligible an applicant who has been guilty of a crime, but this “does not mandatorily forbid the employment in civil service of a person who has been convicted of a crime, but whether conviction of a crime disqualifies for civil service employment is a matter for determination of local Civil Service Commission in the exercise of its administrative discretion.”⁴

⁴ Beck v Finegan 254 AD 110 (1st Dept 1938)

The Human Rights Law

An arrest is not a conviction. The Human Rights Law, found in Executive Law §296(16), prohibits inquiring about any prior arrests or criminal accusations not then pending against the candidate that were terminated in the candidate's favor. This bar does not apply to application for employment as a police officer or peace officer. It is appropriate to inquire as to whether the candidate has ever been convicted of a crime or to inquire as to whether there are currently any arrests or criminal accusations pending against the candidate. Arrest records should be treated differently. While a conviction record constitutes evidence that a person engaged in the illegal conduct alleged (i.e., convictions require proof “beyond a reasonable doubt” in a court of law), an arrest without a conviction does not establish that a person actually engaged in such criminal behavior.

The following are some terms used related to criminal actions:

- **Expungement** or sealing of an individual’s records of arrest or other court proceeding by the courts in accordance with §160.50 of the Criminal Procedure Law. The arrest and prosecution is a nullity and such should not be used as a basis for disqualification.
- **Adjournment in Contemplation of Dismissal (ACOD)** is where the defendant is not convicted of a crime, and the charge is dismissed after a set period of good behavior, with or without conditions set by the court. Municipal civil service agencies should not disqualify based on guilt of a crime in this instance.

- **Conditional Discharge** (CD) is a disposition after conviction, terms set by the court, a suspended sentence on particular conditions for a fixed period of time. Since a conviction did occur, municipal civil service agencies may disqualify individuals who have been conditionally discharged.

A municipal civil service agency's determination was not supported where the decision to disqualify was based on guilt of a crime and where the civil service agency's concern was solely based on the crime the individual was charged with and not the conviction which resulted, which was a lesser offense.⁵

In addition, the Human Rights Law (found in Executive Law, §290-301) makes it illegal to discriminate based on criminal convictions without considering the provisions of Article 23-A of the Correction Law.

Article 23-A of Correction Law

Before disqualifying an applicant based on a conviction for a criminal offense, the civil service agency should review Article 23-A of Correction Law. This article sets forth the factors to be considered concerning the employment of persons previously convicted of one or more criminal offenses and the basis upon which employment may be denied.

⁵ Adler v Lang, 21 Ad 2nd 107 (1st Dept 1964)

§752 of Correction Law

Correction Law, §752, prohibits unfair discrimination against persons previously convicted of one or more criminal offenses. No application for any employment, to which the provisions of this article are applicable, shall be denied by reason of the applicant's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses, unless:

(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or

(2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

§753 of Correction Law

Correction Law, §753, provides for the factors to be considered concerning a previous criminal conviction.

1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency shall consider the following factors:

(a) The public policy of this state, as expressed in this act, is to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought.

(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

2. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

Certificates of relief from disabilities or certificates of good conduct are issued by the Courts or Parole Board and are discretionary. These two certificates have different eligibility criteria, and neither is issued prior to release from incarceration. A certificate may remove mandatory disabilities in general or only those specifically indicated by the Courts or Board of Parole. If either kind of certificate is issued only for specific disabilities, a supplementary certificate granting relief from additional disabilities may be issued.

§701(1) of Correction Law

Pursuant to §701(1) of Correction Law, an individual is eligible for a certificate of relief if he/she has not been convicted of more than one felony.

A certificate of relief may remove any mandatory legal bar or disability imposed as a result of conviction of the crime or crimes specified in the certificate. The certificate of relief does not, however, enable an individual to retain or become eligible for public office. The removal of mandatory legal bars restores an individual's right to apply and be considered for employment or license, but does not guarantee it will be granted.

In contrast to the certificate of relief, an individual is eligible for the certificate of good conduct even if he/she has been convicted of more than one felony. An individual does not become eligible for a certificate of good conduct, however, until a minimum period of time has elapsed from the date of his/her unrevoked release from custody by parole or from the date his/her sentence ended.

A certificate of good conduct has the same effect as the certificate of relief. In addition, the certificate of good conduct may restore a person's right to seek public office. The certificate may remove all legal bars or disabilities or remove only specific bars or disabilities.⁶

⁶ NYS Division of Parole web site <http://parole.state.ny.us/faqs.html>

In making this determination, the licensing officer or employer is required to consider eight factors (see Correction Law, §753). One factor is the public policy of the State "to encourage the licensure and employment of persons previously convicted of one or more criminal offenses" (§753[1][a] of Correction Law). All eight factors, however, must be considered.⁷ Consideration must be given to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which creates a presumption of rehabilitation in regard to the offenses covered by these certificates (§753[2] of Correction Law).⁸

(f) Disqualification based on False Statement of Material Fact or

(g) Practicing Fraud or Deception in the Application for Securing Employment

Candidates may be disqualified for making false statements or practicing any fraud or deception in their application, examination or in securing eligibility for appointment. Material facts are facts which if omitted or falsified are sufficient to constitute a basis for disqualification.⁹

"Municipal civil service commission was authorized in relying on applicant's lie as to whether he had been convicted of an 'offense' to declare applicant ineligible to be appointed city fire fighter. Municipal civil service commission could rely upon applicant's 'No' answer to question asking whether he had ever been dismissed from

⁷ Gallo v. State of New York, et al., ___AD 3d___ (3rd Dept., 2007)

⁸ Op Atty Gen [Inf] 81-7, 82-73; Op Atty Gen [Inf] 84-37

⁹ Castner v. Griffith 166 Misc. 2nd 578 (1995), Reversed 226 AD 2nd 1095 (4th Dept 1996)

employment as grounds for removing applicant's name from list of candidates eligible for appointment as city fire fighter, although applicant claimed that question was overbroad in that it called for information concerning any type of termination, where applicant's dismissal from employment had been on basis of misconduct.”¹⁰

“The Municipal Civil Service Commission has the power and duty to rescind a certification for applicant’s misstatement of material fact on which Commission relied in determining that applicant was eligible to take the examination, regardless of whether the misstatement was made with fraudulent intent or by mistake.”¹¹

The courts found that a “Civil service commission did not abuse its discretion in finding that employee lacked requisite character for position with city where employee submitted false and misleading answers to questionnaires relating to his conviction record; commission could find that employee's responses were intended to conceal true nature of criminal record.”¹²

“Disqualification of police officer for 'fraud of a substantial nature' in his application for employment was justified, where officer did not reveal either fact of his military service or his use of an alias in the military; moreover, amendment to application, falsely indicating that applicant was employed in a civilian job while he is actually in the military, went beyond mere concealment.”¹³

¹⁰ Griffin v. Carey, 547 F. Supp 449 (1982)

¹¹ Shraeder v. Kern 287 NY 13 (1941), reargument denied 287 NY 760

¹² Smith v. City of New York 228 AD 2d 381(1Dept. 1996), leave to appeal denied 89 NY 2d 806

¹³ Angelopoulos v. New York Civil Service Commission 176 AD 2d 161(1 Dept. 1991) , appeal denied 79 NY 2d 751

Deception and fraud requires intent, and an innocent mistake would not satisfy these criteria. The background questionnaire can be considered by the civil service agency as supplemental application for employment which should include an attestation statement, signed by the candidate, indicating intentionally making a false statement in the application or for practicing fraud or deception in the application will result in disqualification.

Disqualification based on (e) Termination from a Public Service or
(h) Dismissal from Private Employments

Civil Service Law, §50(4), provides that municipal civil service agencies may consider prior dismissals, terminations or resignations when making a disqualification decision.

When the dismissals, terminations or resignations occurred in the public sector, the statute uses the singular term “position.” Therefore, one prior dismissal, termination or resignation, accompanied by the appropriate documentation, would support a municipal civil service agency’s disqualification decision. Conversely, a failed probationary period, which is based on unsatisfactory performance, is insufficient to satisfy these criteria. Some “appropriate investigation” must be conducted to verify such dismissal, termination or resignation resulted from the employee’s misconduct or

incompetency, a Civil Service Law §75 proceeding, or an alternate contractual disciplinary procedure.

When disqualifying an applicant or eligible on the basis of dismissal from private employment, one private sector termination is not sufficient grounds for disqualification as the statute cites “private employments” in the plural.

Municipal Civil Service Rules

Municipal Civil Service Rules have the force and effect of law. Since Rules can vary between jurisdictions, the Municipal Civil Service Rules must be consulted for any specific provisions regarding disqualification. The Municipal Civil Service Rule on Disqualification is applied in conjunction with §50(4) of the Civil Service Law and allows the municipal civil service agency to more precisely define its authority and actions to carry out this provision.

Model Rule IX - Disqualification provides:

1. Notification of Disqualification

An applicant who is disqualified for an examination or appointment shall be notified of the reasons for such disqualification and afforded an opportunity to submit facts in opposition to such disqualification.

2. Verification of Qualifications

Any applicant who refuses to permit the Commission to investigate matters necessary for the verification of his/her qualifications or who otherwise hampers, impedes or fails to cooperate with the Commission in such investigation shall be disqualified for examination, or, after examination, for certification and appointment.

3. Disrespect for Processes of Law

A record of disrespect for the requirements and processes of law may be grounds for disqualification for examination or, after examination, for certification and appointment.

In addition, some Municipal Civil Service Rules call for good moral character as a requirement of the position and provide for disqualification of applicants lacking such requirements.

An applicant with history of traffic violations and collisions was disqualified based on “disrespect for the requirements and processes of law and unsatisfactory reputation” and he sued. The Court determined the Commission “did not act arbitrarily or unreasonably in determining that the petitioner did not demonstrate the requisite character to be eligible for the position...”¹⁴

“Commission may inquire into character and reputation of applicants for public

¹⁴ Metzger v. Nassau County Civil Service 54 A.D.2d 565(2 Dept. 1976)

employment and exclude from civil service any person it deems unfit to occupy such position by reason of, ...want of character, experience, tact, integrity, or a lack of proper disposition or the existence of habits which would render the applicant unfit to assume the duties of the position.”¹⁵

¹⁵ Metzger v. Nassau County Civil Service 54 A.D.2d 565(2 Dept. 1976)

III. Due Process

Civil Service Law, §50(4), states in part, “(N)o person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.”

This section places a responsibility on the municipal civil service agency that intends to disqualify an applicant to provide due process to the applicant. When an applicant is disqualified for not meeting a particular requirement, the applicant must be notified of the reason for disqualification and be given the opportunity to submit information that would demonstrate that he/she meets the qualifications in question.

The legal authority to disqualify is discretionary and is not mandatory. As §50(4) states: “municipal Commissions *may* [emphasis added] refuse to examine an applicant, or after examination to certify an eligible.” A municipal civil service agency “is obligated not to do so arbitrarily or illegally or without having a foundation in substantial evidence”¹⁶ to support its determination. It is also incumbent upon a municipal civil service agency to consider various aggravating and/or mitigating factors in this regard.

¹⁶ Richie v Coughlin, 48 AD2nd 178 (3rd Dept 1989)

As stated earlier, when a municipal civil service agency intends to disqualify an applicant or candidate based on their conviction of a crime, the municipal civil service agency should review the criteria for effectuating such disqualifications provided in Article 23-A of Corrections Law. The municipal civil service agency should establish a procedure to seek additional information from candidates regarding their criminal history and enable the applicant to provide a certificate of relief from disabilities, a letter of support from employers, or letters of reference to assist the civil service agency in making a determination whether to qualify or disqualify the individual. This provides due process to the candidate and allows the municipal civil service agency to satisfy the consideration criteria in §753(2) of Correction Law.

Correction Law, §754, further requires that when denial of employment is based upon a criminal conviction and the individual being denied employment on such grounds requests a written statement setting forth the reasons for denial of employment, the written statement must be provided to the applicant or candidate within 30 days of the request being made.

New York State Department of Civil Service Procedures

When the New York State Department of Civil Service disqualifies applicants because of a conviction, dishonorable discharge, or termination from previous employment, the applicants are sent a written notice detailing why they

are being disqualified. The applicant is given 15 business days to supply additional facts in opposition to the disqualification. If the applicant fails to respond, or the applicant does not provide a compelling reason why he or she should not be disqualified, then the applicant is disqualified. (Appendix D provides a summary of the New York State Department of Civil Service procedures and sample letters.)

Municipal civil service agencies should establish a procedure for disqualification, and it is also important to have a policy in place for the review of information and disqualification of candidates who provide derogatory information on their applications or when such information surfaces as a result of a background investigation. Given the importance of the process and the finality a disqualification has for a job seeker, it is important that the policy and procedures followed are applied fairly and consistently. It is necessary for the municipal civil service agency to obtain additional information from the applicant before making a decision. Case-by-case analysis based on the facts presented in relation to the duties and requirements for the specific position cannot be avoided. It is necessary to investigate the specific circumstances surrounding the facts and information to make an educated assessment of the candidate's suitability for appointment to the position.

IV. Time Limitations

There is a legal time frame a municipal civil service agency must be aware of during which it can take action to disqualify. Civil Service Law, §50(4), establishes that a “municipal commission may investigate the qualifications and background of an eligible after he has been appointed from the list [read eligible list], and upon finding facts which if known prior to appointment, would have warranted his disqualification, or upon a finding of illegality, irregularity or fraud of a substantial nature in his application, examination or appointment, may revoke such eligible’s certification and appointment and direct that his employment be terminated, provided, however, that no such certification shall be revoked or appointment terminated more than *three years* [emphasis added] after it is made, except in the case of fraud.”

V. Minimum Qualifications and Legal Requirements

Desired Qualifications vs. Minimum Qualifications – What are the Requirements of the Position?

Officially-established minimum qualifications to hold a position are set by municipal civil service agencies pursuant to §22 of the Civil Service Law and Municipal Civil Service Rules. Job analysis data should support how the qualifications are set, that they are bona fide occupational qualifications, and that they do not represent an artificial barrier to employment.

Where do the requirements come from?

Careful consideration should be given to statutes or regulations which impact qualifications necessary for appointment. It is the responsibility of municipal civil service agencies to confirm qualifications which appointing authorities indicate are statutorily required or required by regulations. These qualifications could include: educational requirements, licensure to hold the position, training or certification requirements, or fingerprinting and criminal history clearance.

Minimum qualifications define the lowest level of acceptable education and/or experience required of a candidate such that the candidate could then reasonably be expected to satisfactorily perform the duties of the position after the required

probationary period or training program. The qualifications should be such that it would be unreasonable to expect a person having less education and/or experience to be able to satisfactorily perform the duties of the position within a prescribed training period or program. For more information on establishing minimum qualifications, please refer to this Department's *Position Classification Manual* at https://www.cs.state.ny.us/msd/msdonline/pdf/manuals_guides/position_classification_manual_03_07.pdf (password required).

If it is an officially-established minimum qualification of the class specification, the civil service agency bears the responsibility to ensure the requirement is met for appointment, which would include verification of the qualification.

If a requirement is not an officially-established minimum qualification, the civil service agency should discuss with the appointing authority the need to verify that the criterion has been met for appointment. This can include such things as a residency requirement or oath of office requirement upon appointment that are not included in the minimum qualifications. Often the appointing authority desires certain qualifications which can be used as their criteria in selection of candidates. Such criteria may not be used as basis for disqualification, unless parameters established in Civil Service Law, §50(4), can otherwise be met. For example, an appointing authority may prefer to hire individuals who have attained CPR certification prior to appointment, although the officially-established minimum qualifications do not require the certification.

The interview process is an appropriate method to screen for such desired preferences which can be used to make selection from among qualified candidates. The appointing authority may have the option to set certain requirements as terms and conditions of employment.

Civil service should have a discussion with the appointing authority over the duties of the position to make the determination if a requirement should or should not be part of the established qualifications and whose responsibility it will be to verify the candidate has met the requirement.

VI. Verification Responsibility

Exam and Employment Applications

For most civil service agencies and appointing authorities, the examination and employment application will provide a brief description of a candidate's qualifications for employment. Many applications seek general information regarding education, experience and licensure, and ask preliminary questions. Since the initial employment or examination application can be cursory in asking for information from a candidate, in some cases, a deeper level of inquiry into the information provided by the candidate may be necessary. Municipal Civil Service Rules typically provide that "the municipal civil service agency may investigate matters necessary for the verification of qualifications."

Background Investigation

"In today's times, there can be no question of the need for accurate, complete, timely and relevant background investigations of those whom the American people entrust to perform important public service functions. The safety of our employees, our families and our country is ultimately at stake, and we can have no greater priority."

Kay Coles James
Former Director, US Office of
Personnel Management

The background investigation is a tool civil service agencies can use to gain or verify information about applicants and potential candidates for appointment related to claimed experience, education, licensure and

certifications. The background investigation can help ensure adherence to various legal requirements, such as a statutorily-required criminal history check, etc. Many appointing authorities, including: federal, state and local government agencies, use some form of background investigation to verify the credentials applicants claim to possess. The information gained in a background investigation may provide the appointing authority with additional information on a potential candidate. In essence, a pre-employment background investigation is used to obtain information on the background of a candidate in order to make an educated determination whether he/she is suitable and qualified for appointment. Background investigations can include questionnaires, interviews and record checks.

A background investigation can be used to evaluate or verify the following:

- Personal data
- Residence data
- References
- Criminal history records
- Motor vehicle records
- Employment and experience
- Military service records
- Education records
- Other general information

Background investigations are generally conducted following the review of applications in order to verify information to determine whether the candidate is suitable for appointment. Please see this Department's *Application Review Manual* at https://www.cs.state.ny.us/msd/msdonline/pdf/manuals_guides/application_review_manual_03_07.pdf for more detailed information on the process of application review.

Criminal History Checks

Criminal history checks are only one component of a background investigation process. Statutory or regulatory requirements can dictate which positions or duties require criminal history checks through fingerprint clearance as a qualification for appointment (See Appendix A – Circular Letters for specific positions or groups of positions).

What happens where there is no such statutory or regulatory requirement for criminal history check? Municipal civil service agencies can elect to establish the requirement of a criminal history check as part of a pre-employment background investigation of applicants. Civil Service Law §50(4) was amended in 2003 to expressly provide that municipal civil service agencies may require applicants or eligibles to undergo a State and a national criminal background check to determine if an applicant has been convicted of a crime. This provision does not apply to any current employees, applicants for transfer or persons on a

preferred list or promotion eligible list. Where established as a requirement by the municipal civil service agency, the fingerprints of an applicant shall be submitted to the Division of Criminal Justice Services, in order to obtain relevant State and/or national criminal history information, if any, concerning such applicant (See Appendix B - Circular Letter #14-03).

What should civil service consider before imposing criminal history clearance qualification pursuant to §50(4)? Job analysis is the key to this determination. It is job relatedness of the qualifications juxtaposed against the duties of the position that will serve as the effective screening procedure and defense of such requirements. Careful consideration should be given to classification factors, such as the responsibility for the safety of others, custody of money, accuracy, and public contacts. The analysis of these factors against the duties and responsibilities of the position will aid in the determination of whether a requirement for appointment is necessary.

The statute also requires municipal civil service agencies to inform applicants that background investigations, which include a criminal history check, will be conducted to verify information (See Appendix C, sample announcement and application notification language). Applicants should sign releases giving consent to obtain information and/or records.

Making the Determination to Conduct Background Investigations

Municipal civil service agencies should consider the need for and resources to conduct background investigations. The need to conduct background investigations will be influenced by the qualifications for appointment, requirements of appointing authorities, or public policy. The depth of the investigation and the information received as a result of such background investigation will need to be reviewed and will consume valuable staff resources. Communication between the appointing authorities and the civil service agency will help define and clarify the responsibilities for conducting background investigations and for making a disqualification determination.

For some civil service agencies and appointing authorities, the benefit of identifying one unsuitable candidate during a background investigation, and potential risk which the employer would bear if such a candidate were hired, will outweigh the cost of staff resources allocated to the performance of background investigations on all candidates for appointment. Allocating resources to conduct background investigations can be challenging, but can provide the necessary information to make informed hiring decisions. It is important to establish a policy for the conduct of background investigations that can be viewed as consistent and not arbitrary. This policy determination should be made by the municipalities and the municipal civil service agency giving consideration to the available staff resources and with guidance from appropriate counsel.

Public employment in local government includes a variety of positions covering a broad range of duties and responsibilities. When resources are limited, it may be prudent to conduct a limited background investigation for select positions, as opposed to none at all. When selecting to conduct background investigations for one position over another, the decision should be based on the duties and responsibilities of such position; i.e., positions involving contact with the elderly, children, disabled persons; positions involved in fiduciary responsibilities; those which are deemed to be public officers; or those for which a background investigation is required by a law or regulations. As indicated previously, job analysis is the key to supporting the determination of which positions require background checks.

VII. Developing Procedures to Address Derogatory Information Obtained from the Background Investigation

Derogatory information obtained during the background investigation may require further investigation before a final decision on disqualification of an applicant is made. Derogatory information could range from somewhat disparaging to very uncomplimentary. Further analysis of such information must be performed and evaluated against the criteria established by Civil Service Law and Rules for disqualification.

It is recommended that municipal civil service agencies develop and share their procedures on the review of derogatory information and its link to the disqualification process with appointing authorities under their jurisdiction. A decision needs to be made on how much information can be shared and disclosed to the appointing authority. There can be a legitimate privacy and disclosure concerns; these considerations should be discussed with appropriate counsel. Appointing authorities should be made aware of the threshold that must be met in order for the civil service agency to disqualify a candidate. If the derogatory information found for a candidate does not meet that threshold to warrant disqualification by the civil service agency, the appointing authority may consider that information as a basis to not choose this person for appointment.

Before developing a policy or going forward with disqualifying a candidate based on derogatory information found on the application and/or as part of the

background investigation, the municipal civil service agency should be comfortable that the criteria for disqualification have been met. Depending on the type of derogatory information, the agency may want to seek advice of counsel before making a determination.

VIII. Summary

Municipal civil service agencies should have a solid understanding of appointing authorities' needs and the legal requirements for appointment to the position before making the determination to conduct background investigations of candidates. The decision to develop background investigation procedures is an important one. Considerations should be made to the specific needs and resources necessary and having realistic expectations of the anticipated outcome and results from such investigations. Proactive and mutual involvement helps define these responsibilities. Municipal civil service agencies have a legal obligation to carefully consider the facts before making a decision to disqualify candidates. Background investigations, combined with due process procedures, can serve as the tools to obtaining the information necessary to make these important decisions.

This manual can serve as a resource regarding the considerations involved with background investigations and disqualifications. Although this manual contains discussion of laws and their impact on disqualification and background investigation, the information should not be treated as legal advice. We encourage the careful reading of the applicable sections of the Civil Service Law, Municipal Civil Service Rules and related laws, case law, and seeking advice from legal counsel related to specific fact patterns, as necessary.

Acknowledgements

We would like to acknowledge the municipal civil service agencies that provided insight into the steps their agencies went through in developing procedures on background investigations which helped structure this manual.

Albany County Department of Civil Service
Dutchess County Personnel Department
Livingston County Personnel Office
Nassau County Civil Service Commission
Ontario County Department of Human Resources
Orange County Department of Personnel
Westchester County Department of Human Resources

In addition, special thanks are extended to the New York State Division of Criminal Justice Services who also contributed to this project.

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APPENDIX A



GEORGE E. PATAKI
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MSD-CL-16-01

MEMORANDUM

TO: All Municipal Civil Service Agencies

FROM: Municipal Service Division

SUBJECT: Fingerprinting of Prospective School District Employees

DATE: June 4, 2001

The New York State Commissioner of Education, pursuant to Chapter 180 of the Laws of 2000, has promulgated draft Rules and Regulations to implement the requirement that prospective school district employees obtain a clearance from the New York State Department of Education before commencing employment.

The draft Rules and Regulations were published in the State Register on May 23, 2001. The comment period is from May 23 - July 9. The Board of Regents will adopt Emergency Action Regulations at their June meeting. The Rules and Regulations will be adopted August 9. The draft Rules and Regulations are available at the State Education WEB site: <http://www.highered.nysed.gov/tcert/>.

The major features of the draft Rules and Regulations of which you should be aware are:

- The requirement applies to prospective employees (defined in Section 87.2(h) (2) to include those persons who "will be reasonably expected by such covered school to provide services which involve direct contact, meaning in person, face-to-face communication or interaction, with students under the age of 21;" (Section 87.4). Persons seeking employment as a school bus driver or school bus attendant cleared for employment pursuant to the Vehicle and Traffic Law are excluded (Section 87.2 (h) (3)).
- The requirement applies to prospective employees who are appointed by "official action of the governing body of the covered school on or after July 1, 2001" (Section 87(4)).

- The Rules and Regulations appear to clearly establish that the prospective employee must obtain a clearance of employment from the State Education Department before commencing employment (Section 87(4)(1)).
- The Rules and Regulations provide for due process procedures to appeal a determination denying clearance (Section 87(5)).

The covered school determines the positions subject to the above requirements and initiates the process to ensure that an appointee possesses a clearance from the State Education Department before beginning work. A person denied a clearance by the State Education Department is not eligible for employment in a position in which such a clearance is required, but may continue on the eligible list and be certified to other positions for which a clearance is not required; that is, unless their removal is warranted under Section 50.4 of the Civil Service Law because of falsification of information on the application for examination. Section 50.4 provides that a municipal commission may refuse to examine an applicant or refuse to certify a candidate who has intentionally made a false statement on their application or has practiced or attempted to practice any fraud or deception in his or her application, examination or in securing his or her eligibility or appointment.

Future examination announcements for any title that exists in a school district or BOCES should contain information on the requirement. You may also wish to inform candidates on existing eligible lists for school district or BOCES titles. The following language is suggested for your use on examination announcements:

Special Requirement for Appointment in School Districts and BOCES

Per Chapter 180 of the Laws of 2000, and by Regulations of the Commissioner of Education, to be employed in a position designated by a school district or BOCES as involving direct contact with students, a clearance for employment from the State Education Department is required.

If you have any further questions, please contact your Municipal Personnel Consultant.



Director, Municipal Service Division

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MSD-CL-18-01

MEMORANDUM

TO: All Municipal Civil Service Agencies

FROM: Municipal Service Division

SUBJECT: Conditional/Emergency Conditional Appointments of Prospective School District Employees

DATE: August 27, 2001

Governor George E. Pataki signed legislation amending the Education Law to provide for conditional and emergency conditional appointments of prospective School District employees (Chapter 147 of the Laws of 2001).

This legislation amends Chapter 180 of the Laws of 2000, which we discussed in a Circular Letter, MSD-CL-16-01, sent on June 4, 2001. This amendment allows School Districts to conditionally employ school employees and creates a process to permit School Districts to make emergency conditional appointments.

Civil Service Responsibilities

As a result of this legislation, it is anticipated that the impact of School District clearances on civil service administration will be greatly reduced. When certifying eligible lists or authorizing appointments, we recommend that you follow your usual certification and appointment process. The issue of whether an appointment is "conditional" or "emergency conditional" is solely a determination of the School District. These designations do not have an impact on civil service status issues. We recommend that appointments be made and recorded by Civil Service based on the type of vacancy to which the appointment is to be made. For example, if the appointment is to be made to a permanent position, it should be recorded as a permanent appointment. If the appointment is made to a

temporary or encumbered position, it should be recorded as a temporary or contingent permanent appointment. The effective date of the appointment will be the date the individual commences employment.

Although every effort is being made by the Education Department to expeditiously process requests for a conditional clearance, you should monitor the appointment process only to ensure that appointments are being effectuated within the time period prescribed in your Rules for certification from eligible lists and while the eligible list is active. As indicated above, for civil service purposes, the date the individual goes on the school payroll is the date we recommend you use as the effective date of employment. As a result, this also will be the date for probation and seniority to commence for permanent appointments.

Under the new legislation, a conditional appointment cannot commence until the Commissioner of Education notifies the School District that the prospective employee has been conditionally cleared. Such appointment will terminate if the Commissioner notifies the prospective employee and appropriate School District that clearance has been denied. Emergency conditional appointments may commence prior to such notification from the Commissioner. However, they too, will terminate upon notification by the Commissioner that conditional clearance has been denied. Accordingly, any "termination" due to a failure to obtain clearance or conditional clearance, occurs by "operation of law" and will not necessitate a hearing under Section 75 of the Civil Service Law.

An individual that is terminated due to a lack of clearance or conditional clearance may request that you restore him/her to the eligible list. At that point you may want to request additional information from the individual to determine if he/she should be restored to the eligible list, or to restore the individual to the list and restrict him/her from certification to other School District positions.

The important points to remember regarding a conditional clearance are:

- ◆ Civil Service is responsible to insure that appointments commence within the life of the certification and the life of the eligible list.
- ◆ The effective dates of appointment and probationary periods should be considered to commence upon the commencement of employment (notwithstanding if it is a conditional or emergency conditional employment).
- ◆ Examination announcements should contain a notice to candidates that clearance from the Commissioner of Education will be required for positions that are designated by the School District as having direct contact with students. (See MSD-16-01, June 4, 2001.)

August 27, 2001

School District Responsibilities

Under the new legislation, the primary responsibilities of the School District and/or Commissioner of Education are indicated below for your reference:

- The School District determines which positions necessitate a conditional clearance.
- The School District determines whether to request a conditional or emergency conditional appointment from the Commissioner of Education.
- The School District is required to forward the fingerprint documentation to the Commissioner of Education.
- The Commissioner of Education will notify the employee if a conditional clearance is to be granted or denied.
- The Commissioner of Education is required to notify the prospective employee and appropriate School District within fifteen (15) business days after receipt of the prospective employee's fingerprints that the prospective employee is conditionally cleared for employment or that more time is needed. If more time is needed, the notification must include an estimate of the additional time needed.
- Prospective employees may commence employment upon receipt of a conditional clearance from the Commissioner of Education.
- The School District may make an "emergency conditional appointment" when an unforeseen emergency has occurred. The School District must initiate the process for an emergency conditional appointment, but the appointment may commence prior to notification from the Commissioner of Education on conditional clearance. Emergency conditional appointments are limited to twenty (20) business days.

If you have any questions about the above, please contact your Municipal Personnel Consultant.


Director, Municipal Service Division

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MSD-CL-2-05

MEMORANDUM

TO: All Municipal Civil Service Agencies

FROM: Municipal Service Division

SUBJECT: Amendments to Title 10 NYCRR (State Hospital Code) – Criminal History Record Check

DATE: March 14, 2005

The State Hospital Code has been amended by the addition of Section 400.23, effective April 1, 2005, to require that a prospective employee of a residential health care facility (nursing home), licensed home care services agency, certified home health agency, long-term home health care program, or AIDS home care program who will provide direct care or supervision to patients must undergo a criminal history record check prior to employment. The regulation does allow an employer to employ an applicant on a conditional basis for 60 days pending the outcome of the criminal history check.

The major features of the new section of the regulations of which you should be aware are:

- The requirement does not apply to any person to be employed in a position requiring a license under the Education Law.
- The requirement applies to prospective employees who are appointed on or after April 1, 2005.
- The employer will identify positions which provide direct care and supervision to patients for which a criminal history record check is needed, inform the prospective employee of the requirement, and submit the required applicant information to the State Department of Health for processing by the Attorney General of the United States.
- The employer may appoint an applicant for 60 calendar days conditioned upon the results of the criminal history record check; if the criminal history check is not completed in 60 days, the employer may extend the employment for an additional 60 days.

- Conviction of a criminal offense as outlined in the regulation will preclude an employer from hiring the prospective employee or retaining the employee.
- The employer shall provide the prospective employee with an opportunity to explain any criminal history record information in the record check.

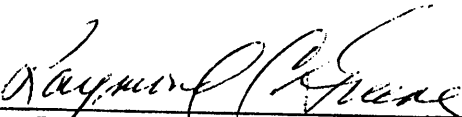
Most of the competitive class positions in the health care agencies covered by this regulation require possession of a professional license, and, as mentioned above, would therefore be excluded from the criminal history check requirement. There may be a few competitive class positions covered by the regulation, but it will apply primarily to non-competitive class positions such as Nursing Assistants, Home Health Aides and Personal Care Aides.

When authorizing appointments or certifying eligible lists, we recommend you follow your usual certification and appointment process. The issue of whether an appointment is conditioned upon the results of the criminal history record check is solely a determination of the employer. Appointments should be made and recorded by Civil Service based on the type of vacancy to which appointment is to be made. In other words, if the appointment is to be made to a permanent position, it should be recorded as a permanent appointment. If appointment is made to a temporary or encumbered position, it should be recorded as a temporary or contingent permanent appointment. The effective date of the appointment will be the date the individual commences employment; this will be the date for probation and seniority to commence in the case of permanent appointments.

Under this regulation, appointments made conditioned upon the results of the criminal history record check cannot continue if the record check reveals a conviction of a criminal offense as described in the regulation. The regulation provides a due process for employees to be notified and to explain criminal history record information contained in the record check. Accordingly, any termination based on the results of the criminal history record check occurs pursuant to regulation and does not constitute discipline or require a hearing under Section 75 of the Civil Service Law.

As we advised you in Circular Letter 14-03, you should include a statement on competitive examination announcements regarding this requirement for titles for which a criminal background check will be performed, and consider including a notification on employment/examination applications that background checks may be required to determine suitability for employment.

If you have any questions on the above, please contact your Municipal Personnel Consultant.


 Director, Municipal Service Division



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MSD-CL-3-05

MEMORANDUM

TO: All Municipal Civil Service Agencies

FROM: Municipal Service Division

SUBJECT: Criminal History Record Check for Mental Health Providers - Chapter 575 Amendments to Mental Hygiene Law

DATE: April 4, 2005

Mental Hygiene Law has been amended to require every provider of mental health services, who contracts with or is approved or otherwise authorized or funded by the New York State Office of Mental Health (OMH) or Office of Mental Retardation and Developmental Disabilities (OMRDD)* to provide services, to request criminal background checks prior to the employment of prospective employees or volunteers who will have regular and substantial unsupervised or unrestricted contact with the provider's clients. This amendment became effective April 1, 2005.

The major features of the new legislation are:

- The requirement applies to:
 - Prospective employees:
 - If appointed on or after April 1, 2005, who will have regular and substantial unsupervised or unrestricted contact with the provider's clients.
 - Current employees:
 - On or after April 1, 2005, moved (appointed, reassigned, transferred, promoted or demoted) from a position which did not have regular or substantial unsupervised or unrestricted physical contact with clients, to one which does. These employees are treated as prospective employees in the new position and must have a criminal history check performed.

* While it may be unlikely there are agencies under your jurisdiction providing services approved, authorized, or funded by OMRDD, be aware this legislation also covers OMRDD's responsibilities to their providers.

- The provider of mental health services is responsible for:
 - identifying the positions which have regular and substantial unsupervised or unrestricted physical contact with the clients for which a criminal history record check is needed;
 - informing the prospective employee of the requirement and his/her rights; and
 - submitting the required applicant information to OMH for processing by the Division of Criminal Justice Services.
- Prohibitions regarding the hiring of employees or volunteers:
 - The provider is prohibited from hiring an individual and allowing the individual to work in unsupervised contact with clients before receiving a determination from OMH.
 - Conviction of a criminal offense as outlined in the statute will preclude a provider from hiring the prospective employee or volunteer. The three types of crimes listed in the statute are:
 - felony conviction for a sex offense;
 - felony conviction in the past 10 years involving violence; or
 - a conviction for endangering the welfare of an incompetent or physically disabled person.
 - If an applicant's criminal history reveals a conviction for any of these three types of crimes, the individual cannot be hired unless OMH determines that the health, safety, and welfare of the provider's clients would not be jeopardized. The law leaves it up to OMH to make determinations if conviction of other crimes will preclude employment.
- The law does permit the provider to hire an individual on a "temporary basis" awaiting a determination from OMH; during this period of employment the employee cannot have unsupervised contact with clients.
- If an individual is charged with a crime but has not been convicted, OMH will advise the provider to hold the application in abeyance if the pending charge is for a felony. If the charge is for a misdemeanor, OMH is permitted, but not required, to direct the provider to hold the application in abeyance.
- When a provider is directed to deny employment, the prospective employee must be given an opportunity to explain in writing why the application should not be denied for employment or volunteer service prior to denying employment.
- OMH is required to promulgate rules and regulations to implement these procedures.

Role of Civil Service Agencies:

When authorizing appointments or certifying eligible lists, it is recommended you follow your usual certification and appointment process. Whether or not a particular position requires a criminal history record check is solely a determination of the local mental health service provider. Appointments should be made and recorded by Civil Service based on the type of vacancy to which appointment is to be made. If the appointment is to be made to a permanent position, it should be recorded as a permanent appointment. If appointment is made to a temporary or encumbered position, it should be recorded as a temporary or contingent- permanent appointment. The effective date of the appointment will be the date the individual commences employment; this will be the date for probation and seniority to commence in the case of permanent appointments. You should monitor the appointment process to ensure that appointments are being effectuated within the time periods prescribed by your Rules for certifications from eligible lists and while the eligible list is active.

Under this statute, an appointment cannot be made if the record check reveals a conviction of a criminal offense as described in the statute. The statute provides due process for the prospective employee to be notified by the provider that OMH has denied employment and to notify the individual of the basis for denial. The individual is provided an opportunity to explain in writing why he or she should not be denied employment. Accordingly, denial of employment based on the results of the criminal history record check will occur pursuant to Mental Hygiene Law and would not constitute discipline or require a hearing under Section 75 of the Civil Service Law, nor action by the Municipal Civil Service Agency under Section 50.4 of Civil Service Law.

An individual that is denied employment by OMH due to criminal history may request to be restored to the eligible list, if still in existence. At that point you may want to request additional information from the individual to determine if he/she should be restored to the eligible list. If you restore an individual to the eligible list, it should be done with the understanding that the individual will be restricted from certification to positions which require unsupervised or unrestricted contact with the mental health services clients.

As suggested in Circular Letter 14-03, when a similar procedure was put in place for school districts, it is recommended you include a statement on competitive examination announcements regarding the above requirements for titles for which a criminal background check may be performed. In addition, we recommend you consider including a notification on employment/examination applications that fingerprint background checks may be required to determine suitability for employment.

OMH plans to take fingerprints electronically through a system called LIVE SCAN in order to process the requests for criminal history as expeditiously as possible.

The Office of Mental Health has detailed information on this legislation on their website: <http://www.omh.state.ny.us/omhweb/fingerprint/>. Chapter 575 of the Laws of 2004 and a "FAQ" section on the fingerprinting requirements are available on this site for your review. The Office of Mental Retardation and Developmental Disabilities also has similar information on their website: http://www.omr.state.ny.us/cbc/hp_cbc_index.jsp.

If you have any questions on the above, please contact your Municipal Personnel Consultant.



Director, Municipal Service Division

APPENDIX B



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MSD-CL-14-03

MEMORANDUM

TO: All Municipal Civil Service Agencies
FROM: Municipal Service Division
SUBJECT: Chapter 164, Laws of 2003—Criminal Background Checks
DATE: October 16, 2003

On July 22, 2003, Governor George E. Pataki signed Chapter 164 of the Laws of 2003, which amends several sections of law, including Section 50(4) of the Civil Service Law. The legislation expressly provides municipal civil service agencies may require applicants or eligibles to undergo a State and a national criminal background check to determine if an applicant has been convicted of a crime.

This Chapter adds a new closing paragraph to Section 50(4), providing municipal civil service agencies may require applicants for original appointment to positions in the classified service to be fingerprinted for the purposes of conducting a criminal background check by the State Division of Criminal Justice Services (DCJS) and the Federal Bureau of Investigation (FBI). The enactment of this legislation is in response to information received from the FBI that such a legislative authorization was necessary to allow the FBI to conduct criminal background checks and release records to municipal civil service agencies.

Municipal civil service agencies are not required to conduct criminal background checks on applicants for all positions under their jurisdiction. However, civil service agencies electing to require applicants for a particular position to submit to a State and national criminal background check must inform applicants a background check may be conducted, and describe the procedures in place for the completion of the background check.

In order to meet the notification requirement of this legislation, civil service agencies will need to include a statement on the competitive examination announcements for titles for which criminal background checks will be performed. Local agencies should also consider including a notification on employment/examination applications that background checks may be required for positions that are other than competitive to ensure the notification requirement included in this Chapter is met.

We recommend the following statement be included on applications and announcements:

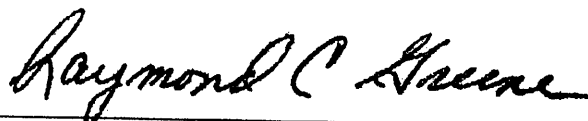
Background Investigation: Applicants may be required to undergo a State and national criminal history background investigation, which will include a fingerprint check, to determine suitability for appointment. Failure to meet the standards for the background investigation may result in disqualification.

Fingerprints to be used in performing the background checks would be collected from applicants pursuant to regulations promulgated by the DCJS, which will perform the State background check. DCJS will also submit the fingerprints to the FBI for the completion of the national background check. Individuals found to have criminal histories that bar their appointment to the position sought would then be disqualified by the municipal civil service agency pursuant to Section 50(4) of the Civil Service Law.

As mentioned above, this Chapter applies to applicants or eligibles for original appointment to positions in the classified service. Current employees, transfer candidates, individuals reinstated from preferred lists pursuant to Section 81 of the Civil Service Law and applicants for promotion examinations or current eligibles on promotion eligible lists are specifically exempted from the provisions of this Chapter.

This act took effect July 22, 2003.

A copy of the legislation is attached. If you have any questions concerning the legislation, please contact your Municipal Personnel Consultant.

A handwritten signature in black ink, reading "Raymond C. Greene". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Director, Municipal Service Division

Attachment

APPENDIX C

Background Investigation

Candidates may be subject to a thorough background investigation to determine suitability for appointment. Applicants may be required to authorize access to educational, employment, criminal history and other records check as part of such investigation. Criminal convictions or other offense are subject to evaluation and may result in disqualification. Applicant will be required to submit the necessary fees for the fingerprint processing, where required.

APPENDIX D

New York State Department of Civil Service Investigation Process

- 1) **Review of applications** – Examination applications of all eligibles (passed candidates) are reviewed to determine who has admitted derogatory information (employment terminations, criminal conviction, other than honorable discharges from the armed forces) or has failed to answer the derogatory questions altogether.
- 2) **Restrictions implemented** – These eligibles are restricted by the Investigations Section until such time as the matter is cleared up. Such restriction requires that the eligible be considered an acceptor for purposes of the “Rule of Three,” but cannot be appointed until the matter fostering the restriction is resolved.
- 3) **Notice of restrictions given to eligible** – Investigations next notifies these eligibles of their restriction and supplies them with the appropriate forms upon which to set out the nature of their crimes, employment terminations, etc., as well as the circumstances which may have fostered them. A fifteen business day limitation is imposed. Eligibles who do not comply are disqualified for their failure to cooperate in accordance with the provisions of Section 3.2(c) of the Rules for the Classified Service.
- 4) **Review of specifics** – Where the eligible complies, the information supplied is examined against the duties and responsibilities of the position to be filled. In the case of employment terminations (including

less than honorable discharges from the armed forces), are the duties and responsibilities of the position from which termination occurred, similar to those of the position to be filled?

- 5) **Evaluation of the circumstances** – Where the positions are similar, the eligible's entire work history is considered. How long ago was the termination? Was this a first job? What has been the caliber of the eligible's work history since the termination? How old was the eligible when terminated? Most important of all, what was the basis for the termination?

(a) Prior terminations – Should a "Mental Health Therapy Aide" eligible admit to a recent termination from a similar position at a nursing home, for example, that may be disqualifying, especially if the eligible in question neglected his/her patients. Conversely, that same eligible's recent firing from a health product sales position, for failing to meet the company's sales quota, would not. While both terminations were based upon incompetency, the sales position bore no resemblance to the duties required of a MHTA.

(b) Prior criminal conviction – These same principles apply when considering criminal records. As with the employment situation, the position to be filled must be examined in light of the eligible's criminal history as well as the time which has elapsed since the crime's commission, the eligible's age at the time of commission,

the number of convictions, evidence of rehabilitation (Certificate of Relief from Disabilities) and the eligible's honesty in admitting same. A MHTA eligible with a long record of drug convictions can be disqualified. Such a person would, if appointed, often times work alone and have access to the facility's pharmacy where narcotics are stored. Still, this same eligible might be the ideal person for a Substance Abuse Counselor vacancy. Someone who has overcome their narcotic habit and now holds a responsible position might be just the type needed to reach others in the same predicament. The burden of providing this information rests solely with the eligible.

- 6) **Notice of Possible Disqualification** – Once Investigations has completed this review, it must determine whether the eligible is a serious risk to his or her appointing authority. Where it is thought the eligible is not, the restriction is removed. Conversely, where the eligible is believed to be a risk, the Investigations Section will seek that individual's disqualification by means of a "Notice of Possible Disqualification" (see sample Attachment "A"). This notice will set forth the legal basis for the proposed action, then present the information it has developed and conclude with arguments for disqualification. The eligible is further admonished, a reply, contesting the substance of the notice, must be received within fifteen business days of that notice. To do otherwise is to incur disqualification for a failure to cooperate in

accordance with the said provisions of Section 3.2(c) (see sample Attachment “B”). Where the eligible replies within the time stated and has refuted the arguments offered in support of disqualification, the eligible remains qualified and the restriction against his/her name is removed.

- 7) **Notice of Disqualification** – Conversely, should the eligible fail to persuade the Investigations Section that its initial decision was ill-advised, the eligible is next sent a “Notice of Disqualification” (see sample Attachment “C”). Like the “Notice of Possible Disqualification,” it sets forth the statutory basis for the disqualification, recites the initial basis for it, and then outlines the weaknesses of the eligible’s position.

The disqualification concludes by advising the same eligible of his/her right to appeal to the Civil Service Commission. To perfect the appeal, the eligible must first contact the Investigations Section within thirty calendar days of the date of the “Notice of Disqualification.”

- 8) **Review by the Civil Service Commission** – Once disqualified, if the eligible proceeds in a timely fashion, he/she may request Commission review. The review may be based upon a written submission or, if the eligible desires, a conference before the Commission. The conference is fairly informal, foregoes sworn testimony and cross-examination, but

permits the introduction of various evidence, including evidence of mitigating circumstances.

- 9) **Court Review** – If a Commission appeal is denied, the eligible may bring an Article 78 proceeding

DISQUALIFICATION LETTER , SUBJECT CAN APPEAL DECISION TO CS
COMMISSION

November 1, 2006

Mr

NOTICE OF DISQUALIFICATION

EXAMINATION 20-538, TAX AUDITOR TRAINEE 1

Dear Mr.:

By letter dated July 25, 2006 we advised you that the Department of Taxation and Finance (Tax Department) sought your removal from the eligible list for Tax Auditor Trainee 1. Their basis for that action was the incomplete and discrepant information which you provided to the Tax Department in your application for that examination.

You have since provided additional information about your employment history, but the fact remains that you failed to do so in the application you signed on August 25, 2005. As we pointed out to you in our July 25, 2006 letter, your employment experience was a significant factor in arriving at your final score in the examination. For that reason it was essential that you provide complete and accurate information to the Tax Department at the time you applied for the Tax Auditor Trainee 1 examination. That you plainly did not do.

The fact that the application provided insufficient space for your to provide complete information cannot excuse your failure to furnish complete information. The instructions at the bottom of page 4 of the Supplemental Questionnaire you were given prominently direct you to *Use additional sheets if necessary to complete information.*

Furthermore, we cannot accept an amended statement of your job experience, because to do so would disadvantage all others who took the examination and have not been afforded a similar opportunity to amend their applications.

We are therefore obliged to disqualify you for the Tax Auditor Trainee 1 examination. Our basis for this action is contained in Civil Service Law Section 50.4(g) which provides that

The state civil service department . . . may refuse to examine an applicant, or after examination to certify an eligible . . . who has practiced . . . any deception . . . in his application, or in his examination, or in securing his eligibility or appointment

It does not appear that you intended to deceive, but it is clear that you did not exercise due diligence in completing your application, particularly in light of the attestation you signed in your application in which you affirmed that

. . . all statements made on this application (including any attached papers) are true. I understand that all statements made by me in connection with this application are subject to investigation and verification and that a material misstatement or fraud may disqualify me from appointment . . .

You are free to take future Tax Auditor Trainee 1 examinations and, if successful in a future examination, you would be considered for appointment.

Given that any position in the field of auditing requires precision, accuracy and completeness, you would be well advised to assemble in advance of any future application all the details of your employment history, and to update your resume accordingly so that the information you supply will be complete and consistent.

You may appeal this determination to the Civil Service Commission by submitting to the President of the Commission a short and plain written statement of those facts upon which you rely to prove that your disqualification is incorrect. That appeal must be filed within ten days of the date of this written notice to be heard.

Sincerely,

Raymond W. Michaels
Supervisor,
Civil Service Investigations

cc: File

FOLLOWING WRITTEN EXAM, REQUEST TO SUBJECT FOR ADDITIONAL INFORMATION.

August 1, 2006

NOTICE OF POSSIBLE DISQUALIFICATION

RE: EXAMINATIONS 24-646, *Beginning Clerical Worker*

Dear Ms.:

You were advised in our July 24 letter that you had passed the above examination but could not be appointed because you had disclosed felony or misdemeanor convictions and that you had not answered the question of whether you were ever discharged from any employment except for lack of work or funds, disability or medical condition. To this last question, you responded that you have never been discharged from employment under those circumstances.

However, you do indicate that you have been convicted of a misdemeanor. We ask that you provide information concerning the incident(s).

Please use the enclosed form and return envelope to describe the incident(s) and state the disposition of the case(s), that is, fine, probation, community service, or other. If you have or can easily obtain a Certificate of Disposition relating to that case, please furnish a copy of that document.

Please be sure your reply reaches this office with 15 (fifteen) business days. To do otherwise may result in your disqualification under Section 3.2(c) of the *Rules for the Classified Service*. That section provides

The burden of establishing her qualifications to the satisfaction of the Civil Service Department shall be upon the applicant. Any applicant who refuses to . . . cooperate . . . in such investigation shall be disqualified

Sincerely,

Terrence Dunphy
Civil Service Investigations

Enclosures
cc: File

REQUEST FROM AGENCY TO HAVE SUBJECT REMOVED FROM ELIGIBLE LIST

March 1, 2006

NOTICE OF POSSIBLE DISQUALIFICATION

EXAMINATION NO. 20-483, FOOD SERVICE WORKER 1

Dear Mr.:

Officials in the Office of Mental Health (OMH) seek your disqualification from the eligible lists for Food Service Worker 1. The basis for this action is Civil Service Law Sections 50.4(d), which reads

The state civil service department . . . may refuse to . . . certify an eligible . . . who has been convicted of a crime . . .

In your September 10, 2004 application for Food Service Worker 1 you disclosed convictions for Criminal Possession of a Controlled Substance, 3rd degree, and felony Possession of a Firearm.

The OMH officials contend that these offenses render you unsuitable for employment in a setting where you would be interacting with vulnerable individuals and would pose a potential risk to their safety.

Civil Service Law affords you an opportunity to rebut that contention. Should you elect to do so, please be sure your reply reaches this office within fifteen (15) business days of the date of this *Notice*. Otherwise, you face disqualification for a failure to cooperate as provided by Section 3.2(c) of the *Rules for the Classified Service*. That section reads:

The burden of establishing his qualifications to the satisfaction of the Civil Service Department shall be upon the applicant. Any applicant who . . . fails to cooperate . . . shall be disqualified

Sincerely,

Raymond W. Michaels
Supervisor,
Civil Service Investigations

cc: File

FOLLOWING WRITTEN EXAM, SUBJECT FAILED TO PROVIDE INFORMATION
REQUESTED WITHIN TIME FRAMES - DQ-FTC

September 5, 2006

NOTICE OF DISQUALIFICATION

EXAMINATION NO. 24-646, BEGINNING CLERICAL WORKER

Dear Ms.:

Having passed the above examination, you were advised your name would now appear on our eligible list for same. Even so, you could not be appointed, for you had disclosed one or more prior felony or misdemeanor convictions. As well, you disclosed that you were under charges for a crime. More information would be needed before your qualifications could ultimately be determined. A copy of our request for that information is enclosed.

Having received nothing from you within the prescribed fifteen (15) business day period, we have invoked the provisions of Section 3.2(c) of the *Rules for the Classified Service*. It states, "Any applicant who refuses to . . . cooperate . . . in such investigation shall be disqualified"

Should you provide this information at some future date, we *may* reconsider our determination.

Sincerely,

Terrence Dunphy
Civil Service Investigations

enclosures

APPENDIX E

Background Court Briefs

Cowen v. Reavy, 283 NY 232 (1940)

This case considered whether essential tests and qualifications established for positions could be overturned by the courts. In this case, the New York State Department of Civil Service announced an examination for Unemployment Insurance Referee. Among the information included on the announcement for the examination were the minimum qualifications for the position and the weighting of the components of the examination. The relative weights prescribed were 40 percent for the written examination, and 60 percent for an evaluation of “training, experience general qualifications.”

Several applicants who had been disqualified for examination sued, challenging the reasonableness of the minimum qualifications. They also asserted that the weight assigned to the written component of the examination relative to the weight assigned to the evaluation of training and experience was unreasonable, and that the standard being used to measure the training and experience portion of the examination was subjective. The Supreme Court ruled, and Appellate Division affirmed, in favor of the applicants. The New York State Civil Service Commission appealed.

The Court of Appeals stated that the function of the New York State Civil Service Commission is “to fix a fair and reasonable standard by which may be tested the qualifications of applicants for appointment in the civil service” and

stated that the determinations of the Commission would not be disturbed by the courts unless they could be shown to be arbitrary and capricious.

The Court of Appeals noted that the question of whether minimum qualifications established by the Commission were reasonable was a question of fact that needed to be proved, and ordered the case to the Supreme Court so arguments regarding the appropriateness of the minimum qualifications could be heard. The Court also noted the evaluation of training and general experience did not meet this standard because the evaluation was based on subjective criteria.

Haynes v. Brennan, 16 Misc. 2d 13 (1954)

This case considered whether the termination of an individual from a civil service position and subsequent disqualification from further certification for appointment was reasonably based on facts gathered during a background investigation. Haynes was appointed to the position of Patrolman for the New York City Police Department. He was later terminated based on information gathered during a background investigation report that indicated Haynes had engaged in subversive political activities, had intentionally failed to disclose, among other things, that he had previously used several aliases and maintained more than one Social Security account. The New York City Civil Service Commission subsequently restricted his name from further certification. Haynes sued, arguing that his termination was not based on factual information and that

he had not been provided an opportunity to provide information to refute the report.

The Supreme Court found that it is well established that a civil service commission may perform investigations and disqualify or exclude from certification individuals who are unfit for appointment. However, the determination to disqualify or exclude an individual from certification for appointment must be based on facts and sound logic, "...rather than mere arbitrary, discriminatory or capricious presumption." In this case, the background investigation report submitted to the Commission contained supposition about Haynes' history that was not supported by documentary evidence.

Therefore, the Court ruled that there was not sufficient factual basis to disqualify Haynes, and he was ordered reinstated to Patrolman.

Beck v. Finegan 254 AD 110 (1st Dept. 1938)

This case considered whether an individual convicted of a crime and subsequently pardoned for the criminal activity could be disqualified based upon the criminal conviction. Beck pleaded guilty to the crime of grand larceny in a Pennsylvania court in 1929, served a two-year prison term, was released, and subsequently pardoned by the Governor of Pennsylvania. Beck applied for and took an examination for Director (Education) Men in New York City, and ranked number one on the resulting eligible list. On his application he had noted his

prior conviction. After affording Beck a hearing and opportunity to refute the evidence concerning his conviction, the New York City Civil Service Commission disqualified Beck from certification. Beck sued, arguing that his subsequent pardon prohibited the use of the grand larceny conviction to disqualify him. The Supreme Court ruled against him, and he appealed.

The Appellate Division affirmed the decision of the Supreme Court, stating that a pardon excuses an individual from punishment for a crime, but does not preclude it from being used to impose other disciplinary measures, such as disciplinary action against an attorney or the revocation of a physician's license to practice medicine. The decision of whether or not to disqualify an individual from certification for appointment is an administrative determination within the discretion of the municipal civil service commission. The courts will not interfere with an administrative determination without clear and convincing proof that the discretion of the administrative officer has been abused. Since the Commission based its determination on factual evidence and acted within the discretion provided in the Civil Service Law and municipal Civil Service Rules, the criteria for intervention by the courts was not met.

Adler v. Lang, 21 AD 2d 107 (1964)

This case considered whether an individual could be disqualified from appointment based on an arrest record. Adler took an examination for Assistant Mechanical Engineer and was subsequently appointed to the position. While

serving probation, a background investigation found that Adler had been adjudicated as a wayward minor. As an adult, Adler was arrested and charged with abduction, but the abduction charge was dismissed in exchange for a guilty plea to the lesser crime of assault. The Personnel Director of the City of New York disqualified Adler based on his arrest record. A subsequent hearing held by the New York City Civil Service Commission upheld the determination of the Personnel Director. Adler sought judicial review of the Commission's determination.

The Appellate Division stated that adjudication as a wayward minor could not be used to disqualify an individual from public employment later in life. Further, since §50(4) of the Civil Service Law provides as criteria for disqualification evidence that an individual is guilty of a crime, the charge of abduction could not be considered in determining whether Adler could be disqualified. Based on the record of the hearing afforded Adler by the New York City Civil Service Commission, it was clear that the Commission had considered not only the assault conviction, but the charge of abduction in determining whether Adler should be disqualified, and had not afforded Adler the opportunity to produce witnesses explaining the reasons for the assault conviction. These two factors rendered the hearing provided to Adler insufficient. Therefore, the determination of the New York City Civil Service Commission was annulled, and a new hearing ordered.

This case involved the criteria that must be considered when determining whether an individual should be disqualified for employment based on a criminal background. Gallo applied for a bus driver position with a local ARC. Pursuant to various sections of State law, the Office of Mental Retardation and Developmental Disabilities conducted a background investigation, and found that Gallo had previously been convicted of a crime. Gallo was disqualified based on the criminal conviction.

Gallo sued. The Supreme Court found that the record was insufficient to support Gallo's disqualification and annulled the determination. The Office of Mental Retardation and Developmental Disabilities appealed.

The Appellate Division stated that §753 of Correction Law, contains eight factors that must be considered in making a disqualification determination regarding an individual with a criminal conviction. Included in these factors is the established policy of New York State that encourages the licensure or employment of individuals who have been convicted of one or more offenses. In considering whether to disqualify Gallo, the Office of Mental Retardation and Developmental Disabilities had not included this factor in their consideration. Therefore, since only seven of the factors provided in §753 of the Correction Law were considered, the Appellate Division, annulled the Office of Retardation and

Developmental Disabilities' initial disqualification determination and ordered the agency to reconsider Gallo's application in light of all of the factors.

Castner v. Griffith, 226 AD 2d 1095 (1996)

This case considered whether a misstatement made by an applicant concerning his place of residence could be used as a basis for his disqualification. Castner applied for and passed an examination for Firefighter in the City of Rochester. On his application, he stated that he was a resident of the City. He was subsequently appointed to the position from a certification of eligibles that was limited to City residents pursuant to §23(4-a) of the Civil Service Law. While serving his probationary term, Castner indicated that he had moved out of the City to the Town of Gates, which is located in Monroe County. He was terminated from his position based, in part, on a finding that he had moved out of the City two months prior to his employment, and would not have been appointed if his change of residence had been known.

The Supreme Court initially ruled in favor of Castner, stating that his failure to disclose his change of address until months later was not sufficient to support his termination because the intent of the Public Officers Law that Firefighters may reside anywhere in the county where the municipality employing them is located could not be overridden by §23(4-a) of the Civil Service Law. The City of Rochester appealed.

The Appellate Division reversed the decision of the Supreme Court. According to the Appellate Division, Castner had intentionally misrepresented his residence on several forms submitted at the time of his appointment, and Castner would not have received an appointment without misrepresenting his place of residence. Therefore, sufficient ground for Castner's termination during the probationary term existed.

Griffin v. Carey, 547 F.Supp. 449 (1982)

This case involved a challenge made by an applicant in the City of Yonkers to questions soliciting information about employment history and criminal background. Griffin applied for a Firefighter examination in the City of Yonkers. The application form contained a question asking whether the applicant had ever been dismissed from any employment. Griffin, answered "no" despite the fact that he had been dismissed from his prior employment because of misconduct. The Civil Service Commission disqualified Griffin after his prior dismissal was discovered. Griffin sued, arguing, among other things, that the question on the application was overbroad, and should have been restricted in nature to solicit information only about dismissals due to incompetency, misconduct or habitually poor performance.

The United States District Court found that the question posed regarding prior terminations was appropriate because the criteria for disqualification provided for in the Civil Service Law are broad. "But even if it were overbroad,

plaintiff has no basis for complaining, since his dismissal was for misconduct, an authorized ground for inquiry.” Therefore, the Court would not disturb the determination made by the Commission.

Shraeder v. Kern, 287 NY 13 (1941)

This case considered whether an unintentional misstatement made by an applicant for examination could be used to rescind their subsequent appointment pursuant to §50(4) of the Civil Service Law. Shraeder applied for an examination for Stenographer and Typist. The examination announcement for the position stated that applicants had to have served at least three months between July 1, 1936, and June 30, 1937, in a public welfare department or an emergency relief bureau. Shraeder mistakenly noted on her application that she had possessed the requisite experience during the prescribed time period, but in fact had been employed by the Board of Child Welfare of the City of New York from July 16, 1937, to March 16, 1938. Shraeder was approved for examination, was subsequently appointed, and successfully completed probation. The New York City Civil Service Commission discovered the error, and rescinded the certification for her appointment because she had not possessed the experience to qualify for the examination. Shraeder sued, arguing that the ability of the Commission to rescind eligibility for appointment is limited to instances involving fraud.

The Court of Appeals noted that the Commission “has power and is under a duty to rescind a certification whether an applicant has made a misstatement of a material fact upon which the Commission has relied and upon which it has based its conclusion....That is true whether the misstatement was made with fraudulent intent or by mistake.” Therefore, the decision of the Appellate Division was affirmed, and the determination of the Commission to rescind certification for Shraeder’s appointment upheld.

Smith v. City of New York, 228 AD 2d 381 (1996)

This case considered whether the submission of false or misleading evidence could be used to support an employee’s disqualification. Smith, who received an appointment as probationary sanitation worker in the New York City Department of Sanitation, was required to supply information regarding his criminal background. The questionnaires Smith completed contained incomplete and false information. An investigation of Smith’s background found that he had been convicted of public lewdness, sexual abuse in the third degree, and resisting arrest. Smith was informed by the Personnel Director that he was being disqualified because he lacked the requisite character for the position. Smith sued, seeking his reinstatement.

The Supreme Court initially ruled in favor of Smith, and the City of New York appealed the decision. The Appellate Division noted that civil service commissions have wide discretion in determining the fitness of candidates, which

will be sustained by the courts unless it is clearly abused. Smith had provided incomplete and misleading information regarding his criminal background, obviously intended to conceal the nature of his criminal background. Therefore, the Appellate Division reversed the Supreme Court decision, and upheld the determination of the New York City Civil Service Commission to disqualify Smith.

Angelopoulos v. New York City Civil Service Commission, 176 AD 2d 161 (1991)

This case considered whether the failure to disclose prior military service or use of an alias constitutes “fraud of a substantial nature.” Angelopoulos was appointed to the position of police officer in the City of New York. As part of his application for employment, Angelopoulos was asked to complete a background investigation questionnaire that included questions asking applicants to disclose prior military service and any aliases used by applicants. Angelopoulos did not disclose his military service, which he had engaged in under an assumed name. He also falsely indicated that he was employed by a private sector company during the time period during which he was actually serving in the military.

Subsequent to his appointment, his prior service in the military under an assumed name was discovered. The Civil Service Commission disqualified Angelopoulos for his failure to disclose his prior military service and his use of an alias.

Angelopoulos argued that the omission of his military service and use of an alias while in the military were immaterial to his application for police officer because an agreement he had reached with the U.S. military in response to charges of insubordination rendered his military service a “nullity” which would never need to be disclosed.

The Supreme Court ruled, and the Appellate Division affirmed, that the Civil Service Commission acted properly in disqualifying Angelopoulos. “We cannot say that these misrepresentations were immaterial,” the Court noted, indicating Angelopoulos’ failure to provide the information regarding his military service, his use of an alias, and his falsification of civilian employment during the period of military service goes beyond mere concealment.

Metzger v. Nassau County Civil Service Commission, 54 AD 2d 565 (1976)

This case considered whether the reputation of an individual could be considered by a civil service commission in making a disqualification determination. Metzger took and passed an examination and was on the eligible list for Police Officer in Nassau County. A background investigation that included interviews with neighbors found that Metzger had a reputation for noisy and disruptive behavior and operating motor vehicles at excessive speeds. The investigator also found that Metzger had a record of repeated traffic violations. Metzger was disqualified from further consideration based upon the information gathered by the investigator.

Metzger sued, asserting that the information used to justify his disqualification did not indicate that he had committed a crime, and that a record of criminal behavior would be required to disqualify him pursuant to §50(4) of the Civil Service Law. The Supreme Court ordered Metzger's reinstatement to the eligible list, and Nassau County appealed.

The Appellate Division, citing previous court decisions, stated that the Civil Service Commission has the authority by law to inquire as to the character of applicants for positions in the public service, and that the determinations of the Civil Service Commission will not be disturbed by the courts unless it can be established that the Civil Service Commission has abused its authority. In the instant case, it is not only the criteria for disqualification provided in §50(4) of the Civil Service Law, but also the standards established in §58 of the Civil Service Law for Police Officer. Among the standards provided in §58 is the requirement that candidates be of "good moral character." "Under the circumstances herein," the Court said, "it is our view that appellants did not act arbitrarily or unreasonably in determining that petitioner did not demonstrate the requisite character to be eligible for the position of police officer..." Therefore, the Court would not intervene.

Richie v. Coughlin, 148 AD 2d 178 (1989)

This case considered whether intentional misstatements made on an application for employment in the civil service would void their subsequent appointment at the start. Richie received a permanent competitive appointment to a position with the New York State Department of Corrections (DOCS). Several years following his appointment, it was found that Richie had falsely indicated on his employment application that he had never been convicted of a crime. After several notices were sent to Richie to an old address, Richie was informed by the New York State Department of Civil Service that his appointment was rescinded. Richie appealed the initial determination to rescind his appointment to the New York State Civil Service Commission, and later sued the Department of Civil Service, arguing that he had a right to due process since he had acquired a property right to his position. Richie asserted the due process right was not afforded to him since the notices pertaining to the Commission's actions were sent to an address where Richie no longer resided.

The Supreme Court ruled in favor of Richie, and the Department of Civil Service appealed, asserting that Richie had never acquired a property right to his position because §50(4) of the Civil Service Law provides for the revocation of an appointment of an individual who makes intentional misstatements on an application, and that this section of law voids the ability of the individual to gain a property right to the position.

The Appellate Division, in overturning the decision of the Supreme Court, noted that Richie had only a limited property right, which afforded him due process pursuant to §50(4) of the Civil Service Law. This section of law does not automatically void the appointment of an individual, but rather provides a civil service commission with the discretion to disqualify or rescind the appointment of the individual, upon consideration of the facts and any mitigating circumstances that may exist. In Richie's case, the evidence considered by the State Commission indicated that Richie was found to have intentionally misrepresented his criminal background, and the record showed that the Commission had taken care to consider all of the facts. Therefore, the determination of the State Commission was properly made and should not be disturbed.

It is the policy of the New York State Department of Civil Service to provide reasonable accommodation to ensure effective communication of information to individuals with disabilities. If you need an auxiliary aid or service to make this information available to you, please contact the New York State Department of Civil Service Public Information Office at (518) 457-9375.



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