

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

DIVISION OF STAFFING SERVICES

GENERAL INFORMATION BULLETIN No. 15-02

TO: Department and Agency Directors of Human Resource, Personnel and Affirmative Action Officers

FROM: Scott DeFruscio, Director of Staffing Services

SUBJECT: Fair Chance Hiring Application Revisions and Statewide Employment Application

DATE: July 10, 2015

Fair Chance Hiring

New York State seeks to maximize the pool of talented applicants for agencies to consider for employment and to offer all applicants a fair opportunity to be considered for employment. Disclosure of a criminal conviction before applicants have had a chance to demonstrate their qualifications for a job may have a chilling effect on qualified applicants pursuing employment and on potential employers considering applicants with criminal convictions for employment. In order to minimize such effects, New York State follows a Fair Chance Hiring (FCH) policy.

Under the FCH policy, applicants for employment may not be asked questions relating to criminal conviction history or pending criminal proceedings – even those authorized by Civil Service Law § 50.4 - until the agency determines that it is interested in hiring the individual.

NYS-APP Revision

In furtherance of these laws and policy considerations, the Department of Civil Service (DCS) has revised the examination application, NYS-APP, to remove from the application any requirement that applicants disclose their history of criminal convictions or pending criminal proceedings. Therefore, Question 4 and Question 5 below have been removed from the application in the section titled “Additional Questions for Open-Competitive Applicants Only”:

4. Do you have an arrest or criminal accusation currently pending against you?
5. Have you ever been convicted of a criminal offense (felony or misdemeanor)?

Applicants for open-competitive examinations will continue to answer certain questions authorized by Civil Service Law § 50.4, other than those relating to criminal conviction history or pending criminal proceedings. Questions 1-3 below will remain in the application section titled “Additional Questions for Open-Competitive Applicants Only”:

1. Were you ever discharged from any employment except for lack of work, funds, disability or medical condition?
2. Did you ever resign from any employment rather than face a dismissal?

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3. Did you ever receive a discharge from the Armed Forces of the United States which was not an “Honorable Discharge” or a “General Discharge under Honorable Conditions”?

These revisions have been made in the online application as well as the PDF version of the application available for candidate use from DCS’ web site. In addition, all special applications available to candidates from our web site have been revised. If your agency has any announced examinations requiring the use of a special application and needs more specific information concerning the status of your agency’s special Examination Application, please contact your Staffing Services Representative.

Candidates must use the new application dated 07/2015 to apply for any future examinations. If your office has any copies of previous versions of State applications, destroy your existing supply of the NYS-APP. If your agency must maintain a supply of paper Examination Applications, you may request a new supply, as follows:

Agencies in need of a supply of paper copies of Examination Applications should send an email to shipping@cs.ny.gov. Requesters should enter “Exam Application Order” in the subject line. The body of the email should include:

1. the name of the person to whom the applications are to be sent;
2. the number of applications needed; and,
3. a mailing address where the applications should be sent.

When ordering copies of applications, agencies should allow three weeks for delivery.

Investigations Process

The DCS Investigations Unit shall continue to disqualify passing exam candidates where appropriate, prior to eligible list establishment, based upon information provided in response to questions 1 – 3 on the examination application, and following the due process requirements of Civil Service Law § 50.4.

Until such time that all eligible lists established by DCS disqualify candidates based on responses to questions 1-3 only, eligible lists established will have a list tag in ELMS to reflect that the investigation process has not been completed. Agencies should continue to proceed with the normal list canvass and interview procedures.

Prior to the interview or at the time of interview, a candidate will be asked to complete Part 1 of the new Statewide Employment Application, along with an agency-specific addendum, if necessary, gathering information that relates to the position for which the individual is being considered, to make the interview process more meaningful. However, prior to and during the interview the candidate may not be asked any questions - whether in writing or verbally - regarding the individual’s criminal conviction history and/or pending criminal proceedings.

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If the agency is interested in considering the candidate for appointment after the interview, the agency will ask the candidate to complete Part 2 of the Statewide Employment Application, which will include:

- a. Self-disclosure of Criminal History (containing criminal conviction history and outstanding criminal proceedings); and
- b. Authorization for Fingerprinting (only for certain positions).

It will continue to be the agency's responsibility to handle the fingerprinting process, where appropriate, and subject to the terms of the Use and Dissemination Agreement it has in place with the Division of Criminal Justice Services ("DCJS"). If the candidate and/or the results of a criminal background check performed by DCJS disclose a criminal conviction history and/or pending criminal charges, the agency will give the candidate the opportunity to provide additional information and documentation by sending out the applicable version of the attached letters. After the agency receives any information and/or documentation from the candidate, the agency (with participation of or review by agency's counsel) will review the individuals' candidacy for the position and document its analysis, consistent with the requirements of the Correction Law.

New York State Correction Law § 752 provides that no application for employment or employment held by an individual may be denied or acted upon adversely by reason of a criminal conviction unless (1) there is a direct relationship between one or more of the previous criminal offenses and the specific employment sought or (2) the granting of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. New York State Correction Law § 753 articulates specific factors, each of which must be considered prior to making an employment decision based upon an individual's prior criminal conviction(s). Guidance on how to consider these factors is attached.

If the agency decides to hire following its Correction Law §753 analysis, no disqualification or further action is required. However, if the agency decides not to hire *based upon the candidate's conviction history*, the matter must be referred to DCS, along with all information and documentation upon which the determination was based, and a request for disqualification. DCS shall provide the agency with instructions and forms with which to request disqualifications. DCS shall review the agency's analysis, to assess whether or not it concurs with the agency's determination.

If DCS concurs with the analysis, DCS shall initiate the disqualification ("DQ") process set forth in Civil Service Law § 50(4), adhering to statutory due process requirements. The candidate will ultimately either be disqualified or will remain on the list following investigation. If DCS does not concur with the analysis, the Agency is advised of deficiencies in its analysis, and invited to re-submit its request for DQ, if the Agency chooses to do so.

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Statewide Employment Application

The new Employment Application shall be used in lieu of your agency's existing application, effective July 10, 2015, and will be available to HR Officers at <https://www.cs.ny.gov/businesssuite/Statewide-Employment-Application/>. HR Officers, or their designees, are responsible for the appropriate branding and subsequent distribution of the Employment Applications within their agency. To the extent that your agency must collect additional information specific to the agency, an addendum may be used to capture such information. However, this addendum may *not* ask applicants for employment to provide information regarding Criminal History¹ and must be reviewed and approved by DCS. Questions regarding the Statewide Employment Application should be directed to your agency's designated Staffing Services Representative.

Attachments:

Voluntary Disclosure Letter

Background Check Letter

Mandatory Guidelines on the Application of NYS Correction Law Article 23-A

¹ The only exception to this policy is where certain criminal convictions, by law, preclude applicants from employment in the job title at issue, unless a certificate of relief from disabilities, a certificate of good conduct, or an executive pardon is obtained.

[INSERT AGENCY LETTERHEAD]

Insert Date

Dear _____ :

Thank you for your interest in employment with _____ as a _____. In your employment application, you disclose that you have a prior criminal conviction. As the Agency reviews your candidacy, you are welcome to provide information about your rehabilitation and good conduct since your conviction. This information would be helpful to the Agency in its consideration of your candidacy for employment, but it is not required.

For your reference, examples of information about rehabilitation and good conduct include:

- A brief personal statement describing how your conduct since conviction demonstrates your fitness for employment
- Certificates or other proof of completion of treatment or programming
- Letters of reference, preferably from people not related to you.
- Certificates of Relief from Disabilities or Certificates of Good Conduct
- Any additional information you would like the agency to consider

If you would like to provide information concerning your rehabilitation and good conduct, please send this information to _____ within 15 days of the date of this letter. If you need additional time, please contact _____. If you do not plan to provide any additional information, please notify _____, and the Agency will continue its review of your candidacy without delay.

To be clear, regardless of whether you provide any additional information, the Agency will consider the factors set forth in New York State Correction Law Article 23-A, which are enclosed for your reference, in considering your candidacy for employment.

If you have any questions regarding this letter, please contact _____.

Sincerely,

Attachments:

Correction Law §§752, 753

[INSERT AGENCY LETTERHEAD]

Insert Date

Dear _____ :

Thank you for your interest in employment with _____ as a _____. Your background check reveals that you have a prior criminal conviction. As the Agency reviews your candidacy, you are welcome to provide information about your rehabilitation and good conduct since your conviction. This information would be helpful to the Agency in its consideration of your candidacy for employment, but it is not required.

For your reference, examples of information about rehabilitation and good conduct include:

- A brief personal statement describing how your conduct since conviction demonstrates your fitness for employment
- Certificates or other proof of completion of treatment or programming
- Letters of reference, preferably from people not related to you.
- Certificates of Relief from Disabilities or Certificates of Good Conduct
- Any additional information you would like the agency to consider

If you would like to provide information concerning your rehabilitation and good conduct, please send this information to _____ within 15 days of the date of this letter. If you need additional time, please contact _____. If you do not plan to provide any additional information, please notify _____, and the Agency will continue its review of your candidacy without delay.

To be clear, regardless of whether you provide any additional information, the Agency will consider the factors set forth in New York State Correction Law Article 23-A, which are enclosed for your reference, in considering your candidacy for employment.

If you have any questions regarding this letter, please contact _____.

Sincerely,

Attachments:

Correction Law §§752, 753

Mandatory Guidelines on the Application of New York State Correction Law Article 23-A to Hiring

I. The Article 23-A Balancing Test

- (a) In accordance with the public policy of this State to encourage the employment and licensure of people with criminal convictions, as expressed in Correction Law Article 23-A, a State agency, commission, board, or department (an “agency”) who is considering a qualified candidate who has a criminal conviction or convictions for a position (the “candidate”) shall be permitted to select the candidate unless (i) there is a direct relationship between one or more of the previous convictions and the duties required of the position; or (ii) hiring the candidate in that position would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.
- (b) In order to reject a candidate based on his or her criminal conviction, the agency must arrive at an affirmative finding to the questions set out above in (a)(i) or (a)(ii), by considering each of the eight factors listed under New York State Correction Law § 753. Each of the aforementioned eight factors must be considered individually; none of the eight factors may be disregarded. *See Matter of Acosta v. New York City Dep’t of Educ. et al.*, 16 N.Y.3d 309, 320 (2011). The eight statutory factors are as follows:

Factor 1: The public policy of the state to encourage the employment of persons previously convicted of one or more criminal offenses.

This public policy creates a presumption in favor of employment and places the burden on the agency to demonstrate why the candidate should not be selected based on his or her criminal conviction.

Factor 2: The specific duties and responsibilities necessarily related to the position.

Each position requires competency in a function (*e.g.*, typing, lifting, driving, negotiating a contract, managing a budget). The agency shall compile a list of the functions involved in the position at issue and use that list to evaluate Factor 3 below.

Factor 3: The bearing, if any, the criminal offense will have on the fitness or ability to perform one or more of such duties or responsibilities.

The agency shall evaluate whether the specific elements of a candidate’s conviction renders him or her unable to perform the specific functions of the position identified in Factor 2 above. In the event that an agency finds a significant relationship between the elements of the conviction(s) and the candidate’s fitness or ability to perform one or more of the position’s functions,

it must be able to articulate its reasoning with specificity. Finding a significant relationship between the elements of a conviction and the specific duties and responsibilities of the position does not end the agency's consideration of employment. The agency must consider all eight statutory factors.

Factor 4: The time which has elapsed since the occurrence of the criminal offense or offenses.

Absent a statutory requirement to the contrary, an agency shall not require the lapse of a fixed period of time between the occurrence of the criminal offense(s) and selecting a candidate. Rather, an agency must engage in an individualized analysis for each candidate. In the event that an agency finds that the amount of time elapsed weighs against selecting a candidate, it must be able to articulate its reasoning with specificity.

Factor 5: The age of the person at the time of occurrence of the criminal offense or offenses.

An agency is required to take the age of the candidate at the time of the occurrence of the offense(s) into account, and it must do so with the understanding that individuals who exercise poor judgment as youth or young adults very often mature into law abiding productive adults. In the event that an agency finds that the age of the candidate at the time of the occurrence of the criminal offense(s) weighs against employment, it must be able to articulate its reasoning with specificity.

Factor 6: The seriousness of the offense or offenses.

The agency must evaluate the seriousness of the offense(s) for which the candidate was convicted, and as is the case with each factor, it must weigh its findings against the other seven factors in the final analysis. In the event that an agency finds that the seriousness of the offense weighs against the selection of the candidate, it must be able to articulate its reasoning with specificity.

Factor 7: Any information produced by the candidate, or produced on his or her behalf, in regard to rehabilitation and good conduct.

As part of its analysis of this factor, an agency must review a variety of information if provided, including, but not limited to, evidence of completion of treatment, programming, history of post-conviction employment, volunteer or community activity, and letters of reference from employers, community members and others who can speak to a candidate's conduct since the time of the occurrence of the offense(s).

Factor 8: The legitimate interest of the agency in protecting property, and the safety and welfare of specific individuals or the general public.

As an agent of the State, an agency must evaluate the impact of hiring an individual on the safety and welfare of individuals and property. In doing so, the agency must engage in an individualized analysis for each candidate. In the event that an agency finds that consideration of the safety and welfare of individuals and property weighs against the selection of a candidate, it must be able to articulate its reasoning with specificity.

In addition to these eight factors, an agency must give consideration to a certificate of relief from disabilities or certificates of good conduct issued to an applicant, and such certificate must be considered in the person's favor as a presumption of rehabilitation. However, an agency may not consider the fact that a candidate does not have a certificate as a factor against employment.

II. Procedure.

- (a) Upon disclosure of a criminal offense by the candidate or upon discovery of a criminal offense through a mandatory fingerprinting process, an agency shall communicate with the candidate in writing to offer an opportunity to provide, within a reasonable period of time, a statement or other information regarding his or her rehabilitation or good conduct. A sample of such communication is attached.
- (b) In instances in which a criminal offense is self-disclosed, an agency shall not ask an applicant to produce a court disposition or to provide a copy of the applicant's self-obtained criminal history record ("Rap sheet").
- (c) An agency shall take note of the statutory elements of the offense(s) of which the applicant was convicted and may consider facts relevant to the circumstances of the conviction. To access these facts, the agency may give the candidate an opportunity to discuss them, and the agency may request the accusatory instrument or sentencing minutes directly from the relevant court. To the extent that an agency chooses to review the accusatory instrument or sentencing minutes, it may only do so for the purpose of obtaining facts relevant to the conviction; it may not consider unrelated

allegations contained therein. Further, if the agency chooses to obtain these documents, it must use best efforts to do so in a timely manner so as not to delay consideration of the candidate for employment.

III. Mandatory Bars on Hiring and Correction Law § 751.

An agency shall not select a candidate if a New York State statute expressly forbids selecting a candidate based on that candidate's specific criminal conviction (*e.g.*, robbery) or class of conviction (*e.g.*, felony), except, as set out in Correction Law § 751, when a candidate has received an executive pardon, or a certificate of relief from disabilities or a certificate of good conduct. If a candidate otherwise barred from a position in an agency has an executive pardon or a certificate of relief from disabilities or a certificate of good conduct, an agency shall consider the candidate according to the standards set forth in Section I herein.

Notwithstanding the above, if a federal statute expressly forbids employment based on a candidate's specific criminal conviction (*e.g.* endangering the welfare of a child) or class of conviction (*e.g.* felony) then the agency shall not hire the candidate, even if the candidate has a certificate of relief from disabilities, a certificate of good conduct or an executive pardon. The Agency staff shall consult with their agency's general counsel before determining whether the federal statute exception to Correction Law §751 applies.