S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 00-026

Peace Officers Standards and Training (POST) pre-employment requirements

QUESTIONS

1. In order to be eligible to be certified as a law enforcement officer, POST Commission rules require that a candidate must not have been convicted of, pleaded guilty to, or entered a plea of *nolo contendre* to any violation of any federal or state law or city ordinance involving force, violence, theft, dishonesty, gambling, liquor or controlled substances. May the POST Commission consider the fact that an officer or applicant was found guilty of such crime that is subsequently expunged in accordance with Tenn. Code Ann. § 40-35-313 and Tenn. Code Ann. § 40-32-101?

2. In determining compliance with pre-employment requirements, may the POST Commission consider the fact that the applicant or officer failed to list the expunged conviction on his application for certification after being asked whether he has ever been convicted of, pled guilty to, or pled *nolo contendre* to a crime?

3. In determining compliance with pre-employment requirements, may the POST Commission consider any warrant or charge that has been dismissed after the successful completion of pre-trial diversion pursuant to Tenn. Code Ann. § 40-15-105?

4. In determining compliance with pre-employment requirements, may the POST Commission consider a guilty plea from another state that is later expunged pursuant to the law of that state?

OPINIONS

1. Yes. The Commission may consider the fact that an individual has been convicted of one of the crimes enumerated in Tenn. Code Ann. § 38-8-106(4) regardless of whether the conviction has been expunged or whether post-trial (judicial) diversion was granted.

2. Unless an applicant or officer denied the conviction in an attempt to be evasive, the POST Commission should not consider the fact that he or she failed to list an expunged conviction on the application.

3. No. A person who has successfully completed pre-trial diversion has not been found guilty of a crime.

4. Yes, for the same reasons that the Commission may consider an expunged Tennessee conviction.

ANALYSIS

1. Tenn. Code Ann. § 38-8-106 lists the qualifications for a police officer. This section provides in part that a police officer shall

> not have been convicted of or pleaded guilty to or entered a plea of nolo contendere to any felony charge or to any violation of any federal or state laws or city ordinances relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances.

Tenn. Code Ann. § 38-8-106(4). You have inquired as to whether the Commission may consider the fact that an officer or applicant has been convicted of any of the offenses included in Tenn. Code Ann. § 38-6-106(4), whose criminal record is later expunged.

The effect of expunging certain criminal records is "to restore the person, in the contemplation of the law, to the status the person occupied before such arrest or indictment or information." Tenn. Code Ann. § 40-35-313(b). But as our supreme court pointed out in *State v. Schindler,* 986 S.W.2d 209 (Tenn. 1999):

> Expungement does not return a person to the position occupied prior to committing the offense. Defendants obtaining expungement may have committed criminal acts resulting in lasting physical, emotional, or financial injuries to victims. In many cases, the injured victims cannot be returned to the status quo. Accordingly, the law would blind itself to reality if the law refused to recognize these criminal acts and accord them any legal significance whatsoever.

Id., 986 S.W.2d at 211. It appears to be the general law that while expungement of the record of a criminal conviction may remove many of the disabilities of a criminal conviction, it does not remove the fact of a conviction for purposes of determining one's fitness to practice a particular profession or calling. See generally *The Collateral Consequences of a Criminal Conviction,* 23 Vand. L. Rev. 929, pp. 1149-1150 (October 1970); see also *Turner v. Campbell,* 581 F.2d 547 (5th Cir. 1978); *Taylor v. United States Civil Service,* 374 F.2d 466 (9th Cir. 1967); *Taylor v. Macy,* 252 F.Supp. 1021 (S.D. Calif. 1966). Because § 38-8-106(4) is a qualifications section for police officers, the Commission may consider the conviction despite an expungement of the record of such conviction.

The legislature established the qualifications for police officers for the protection of the public, not to punish particular applicants. A conviction, even if later expunged, is evidence of misconduct; no showing of innocence of the charges is required to qualify for expungement of former convictions. Information about an officer's prior criminal activity is significant and worthy of consideration by the POST Commission, in that a police officer occupies a position of public trust.

2. Whether the POST Commission may consider the fact that an applicant or officer failed to list an expunged conviction on his application for certification depends on the reason the applicant or officer omitted the conviction. Tenn. Code Ann. § 40-35-313(b) provides in part:

> No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of such person's failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of the person for any purpose.

Thus, if an applicant or officer fails to disclose an expunged conviction based upon advice of counsel or an honest belief he or she was not legally required to do so, the Commission may not consider this. On the other hand, if the applicant or officer failed to list the conviction in an attempt to be evasive or untruthful, the Commission may consider that fact; both the Commission rules and Tenn. Code Ann. § 38-8-106(8) require an officer to have good moral character.

3. Pre-trial diversion, in contrast to judicial diversion, does not involve a determination of guilt or innocence. Tenn. Code Ann. §§ 40-15-105, 40-35-313. Although pre-trial diversion and judicial diversion are similar in nature, there is a significant difference between the imposition of probation for pre-trial diversion and judicial diversion. In the case of pre-trial diversion, prosecution is suspended and, if probation is successfully completed, the charges are dismissed. Tenn. Code Ann. § 40-15-105. Thus, an officer or applicant who has successfully completed pre-trial diversion has not been convicted of, pleaded guilty, or entered a plea of *nolo contendre* to any criminal charge.

4. As discussed earlier, Tenn. Code Ann. § 38-8-106(4) mandates that a police officer cannot have been convicted of certain enumerated crimes, and this Office is of the opinion that this includes crimes which have been expunged. That same analysis applies to your question about an officer or applicant being convicted of a crime in another state that was subsequently expunged.

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