

MARCH 11, 2007

## NEW YORK

### I. Automatic Restoration of Rights:

In New York, the right to vote is lost upon conviction of a felony if sentenced to a term of actual imprisonment, and restored upon expiration of sentence of imprisonment, including parole. *See* N.Y. Elec. Law § 5-106(2) (“No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole”); § 5-106(3)(federal convictions); § 5-106(4)(out-of-state convictions). These provisions “shall not apply if the person so convicted is not sentenced to either death or imprisonment, or if the execution of a sentence of imprisonment is suspended.” § 5-106(5). The right to vote is automatically restored upon expiration of sentence or discharge from parole.

A person convicted of a felony may not serve on a jury, N.Y. Jud. Law § 510(3), and forfeits public office. N.Y. Pub. Off. Law § 30(1)(e). New York does not disqualify a convicted person from holding future office. *See* Op. Att’y Gen. 83-60(1983). *But see* N.Y. Const. art VI, § 22(h)(judges removed from office disqualified from future judicial office); *In re Alamo v. Strohm*, 544 N.E. 2d 608 (1989) (officeholder who forfeits office is ineligible to stand for election to the remainder of the unexpired term).

Rights lost may be restored either by a Governor’s pardon (rarely granted, *see* IIA below), or by a Certificate of Relief from Disabilities or Certificate of Good Conduct (available from sentencing court or Parole Board, *see* IIC below).

### II. Discretionary Restoration Mechanisms:

#### A. Executive pardon:

- *Authority:* The pardon power is vested in the Governor (except in cases of treason or impeachment). N.Y. Const. art 4, § 4. May be regulated only as to the manner of applying. Governor must report annually on number of pardons and his reasons for granting.
- *Administration:* Board of Parole must advise Governor on clemency cases if requested. N.Y. Exec. Law § 259-c. Absent exceptional or compelling circumstances, a pardon will not be considered if there is an adequate administrative remedy available. Pardon is considered only if there is no other legal remedy in three cases: 1) to set aside a conviction in cases of innocence; 2) to relieve collateral disability (“This is rarely used since relief may generally be obtained by means of a Certificate of Good

Conduct or Relief from Disabilities”); and 3) to prevent deportation or permit reentry. *See New York State Parole Handbook*, § 9 (2004), available at <http://parole.state.ny.us/INTROparolehandbook.html>. The Executive Clemency Bureau within the Division of Parole screens candidates for eligibility requirements, gathers materials concerning clemency applications, and responds to letters from applicants and others regarding clemency applications. *Id.*

- *Effect:* A pardon addresses unusual circumstances when adequate relief cannot be obtained by issuance of a Certificate of Relief from Disabilities or a Certificate of Good Conduct, and its effect is to “exempt from further punishment” based on the conviction. When given on the basis of innocence, a gubernatorial pardon operates to set aside a state judgment of conviction.
- *Frequency of Grants:* In recent years gubernatorial pardons have very rarely been granted. (Posthumous pardon to Lenny Bruce in 2003 seems to be the only one granted by Governor Pataki, though he has commuted several prison sentences.)

B. Judicial sealing or expungement of adult felony convictions:

*Sealing of nonconviction records:* Adult felony and misdemeanor convictions cannot be expunged, except where a pardon has been given for innocence. Sealing is available for favorable dispositions (e.g., acquittal, dismissal, decline prosecution) and a variety of non-criminal infractions (except DWI and prostitution). *See* NY. Crim. Proc. Law §§ 160.50, 160.55. Sealing is automatic upon termination of the action in favor of a person, unless the district attorney demonstrates to the satisfaction of the court or the court determines on its own motion “that the interests of justice require otherwise, and states the reasons for such determination on the record . . .” Upon the termination of a criminal action or proceeding against a person in favor of such person,

“the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution. The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest or prosecution.”

§ 160.65. Additional sealing provisions apply to Youthful Offender adjudications and juvenile proceedings. § 720.35. These provisions are part of

a broad public policy of protecting those who have been charged but not convicted, or convicted of minor offenses, from the collateral consequences arising from any criminal record.

*Deferred sentencing and diversion options:* An offender may plead guilty and have sentencing deferred upon agreement to participate in in-patient drug treatment under Drug Treatment Alternative to Prison (DTAP) program initiated by Kings County District Attorney, and now available in 28 other counties. The program targets drug-addicted defendants arrested for nonviolent felony offenses who have previously been convicted of one or more nonviolent felonies. Qualified defendants enter a felony guilty plea and receive a deferred sentence that allows them to participate in a residential therapeutic community (TC) drug treatment program for a period of 15 to 24 months. Those who successfully complete the program have their charges dismissed, and the record sealed. Those who fail are brought back to court by a special warrant enforcement team and sentenced to prison. See <http://www.brooklynnda.org/dtap/dtap.htm>

Other deferred adjudication or deferred sentencing programs may also be available for minor offenders, and people with mental illness, which may result in dismissal of charges and no record. See, e.g., <http://www.brooklynnda.org/dtap/TADD.htm>.

C. Administrative certificate:

A Certificate of Relief from Disabilities, N.Y. Correct. Law §§ 700-705, or a Certificate of Good Conduct, §§ 703-a, 703-b, may be obtained to restore certain rights, and may be limited to one or more specific rights. Their purpose is to effectuate the public policy of encouraging the licensure and employment of convicted individuals. *See People v. Adams*, 747 N.Y. S. 2d 909 (2002).

*A Certificate of Relief from Disabilities (CRD)* is available to people with no more than one felony conviction and any number of misdemeanor convictions, either from the sentencing court (for misdemeanor convictions and non-prison state sentences for felony convictions), or from the Board of Parole (for persons sentenced to imprisonment under New York law or who reside in New York but were convicted in another jurisdiction), N.Y. Correct. Law §§ 700(1)(a), 703(1). It may be granted

to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein. Such certificate may be limited to one or more enumerated forfeitures, disabilities or bars, or may relieve the eligible offender of all forfeitures, disabilities and bars. Provided, however, that no such certificate shall apply, or be construed so as to apply, to the

right of such person to retain or to be eligible for public office.

Section 701(1). The court may issue a CRD at the time sentence is pronounced, in which case it may grant relief from forfeitures as well as from disabilities, or at any time thereafter. § 702(1). The Parole Board may issue a CRD at any time after release from prison. § 703(1)(a). A CRD is also available to people with federal convictions who reside in New York at sentencing, or at any time thereafter. If issued prior to expiration of supervision, it is deemed temporary, and may be revoked. § 703(4). Important to obtain at sentencing in order to avoid public housing and employment bars. Court or Board must find that the issuance of a CRD is “consistent with the rehabilitation of the eligible offender,” and “consistent with the public interest.” §§ 702(2), 703(3).

*Certificate of Good Conduct* (CDC) is available to people with multiple felony convictions from the Board of Parole, “or any three members thereof by unanimous vote,” after a waiting period of one to five years, depending on seriousness of offense(s). N.Y. Correct. Law §§ 703-b(3)(1)–(3). A Certificate of Good Conduct is available to persons convicted outside New York, including federal offenders. § 703-b(2). It is granted only if the person has demonstrated “good conduct” for the requisite period and if (like the CRD) granting relief would be “consistent with the rehabilitation of the eligible offender” and “consistent with the public interest.” § 703-b(1). If granted during a period of parole it may be temporary, and may be revoked at any time until the Board’s jurisdiction is ended.

Persons convicted in jurisdictions outside New York State must in addition demonstrate a specific disability resulting from New York law that would warrant granting relief in New York. § 703-b(2).

*Effect:* Certificates issued under either N.Y. Correct. Law § 703 (CRD) or § 703-b (CGC) have essentially the same effect: they relieve an eligible person of “any forfeiture or disability,” and “remove any barrier to . . . employment that is automatically imposed by law by reason of conviction of the crime or the offense.” §§ 701(1), 703-a. (The CRD statute contains certain exceptions that apparently do not apply to CGCs, as described in the section on “public office,” below.) A certificate may be limited to particular disabilities, and the relief may be enlarged by the court or Board of Parole at any time, to include firearms permits. A certificate does not preclude employers or licensing agencies from considering the conduct underlying the conviction as a factor in licensing or other discretionary decisions, but it creates a “presumption of rehabilitation” that must be given some effect in deciding whether there is a disqualifying “direct relationship” between a crime and a job or license. *See* N.Y. Correct. Law § 753 (Part III *infra*).

Neither type of certificate voids the conviction as if it were a pardon. N.Y. Correct. Law § 706. (As noted above in IIA, gubernatorial pardons are not generally available in New York State.) Nor does a certificate preclude a licensing agency from relying on the conviction as the basis for the exercise of its

discretionary power to deny or revoke a license. §§ 701(3), 703-a. *See, e.g., People v. Adams*, 747 N.Y. S. 2d 909 (2002)(CRD creates a “presumption of rehabilitation” and removes the automatic bar from obtaining a license, but does not establish a prima facie entitlement to the license; the licensing agency still maintains the ultimate control whether to grant the license). CRD does not authorize a job applicant with a criminal record to deny on an employment application that he has ever been convicted of a crime, but the employer must consider the certificate, which establishes a “presumption of rehabilitation” as to the criminal offenses specified in the certificate. See § 753(2), discussed in Part III infra; Op. Atty Gen. (Inf.) 81-124 (1981).

These certificates, with certain exceptions, preclude reliance on the conviction as an automatic bar or disability, but they do not preclude agencies from considering the conviction as a factor in licensing or other decisions. N.Y. §§ 701(3), 703-a(3). *Compare Meth v. Manhattan and Bronx Surface Transit Operating Auth.*, 521 N.Y.S.2d 54 (N.Y. App. Div. 1987) (transit authority improperly denied employment as a bus driver to man convicted of bribery, who had been granted certificate of relief from disabilities; authority presented no evidence of consideration of the eight factors to rebut the presumption of rehabilitation that the certificate of relief from disabilities creates), *with Soto-Lopez v. New York City Civil Serv. Comm’n*, 713 F. Supp. 677 (S.D.N.Y. 1989) (dated manslaughter conviction alone was not directly related to a caretaker position nor did it pose an unreasonable risk to persons or property; however, unreasonable risk test met when combined with more recent conviction for sale of narcotics).

*Public Office:* A CRD does not apply to “the right of such person to retain or to be eligible for public office.” § 701(1). Nor does a CRD overcome automatic forfeiture resulting from convictions for violations of N.Y. Pub. Health Law § 2806(5) (nursing home operator’s license) or N.Y. Veh. & Traf. Law § 1193(f)(2) (drivers license suspension). However, these exceptions do not appear in the statute authorizing issuance of CGCs. Therefore, a CGC would appear to be sufficient to overcome bars to public employment. *Compare People v. Olensky*, 91 Misc. 2d 225, 397 N.Y.S. 2d 565 (1977)(Notary Public was a “public officer” so that CRD not sufficient to enable defendant to obtain a notary public commission and work as a court reporter); with N.Y. Exec. Law § 130 (executive pardon or CGC sufficient to overcome bar to notary public position for person with conviction). Accordingly, a first offender who is eligible for a CRD must in addition obtain a CGC if he wishes to obtain certain kinds of public employment deemed to be a “public office,” or over come the specific disabilities in the public health and vehicle codes. *But see People v. Flook*, 164 Misc. 2d 284, 285 (1995)(noting that some licensing statutes require persons convicted of the designated crimes to obtain a CGC and others permit them to obtain either a CGC or a CRD, and finding no relevant distinction between the two statutes for purposes of restoration of firearms rights).

*Firearms:* A Certificate of Relief from Disabilities may expressly restore firearm rights. N.Y. Correct. Law §§ 700(1)(a), 701(1). It is not clear whether a CRD can provide relief from the federal firearms bar.

*Process:* Application for CRD at [www.courts.state.ny.us/6jd/forms/dmv/dp-52.pdf](http://www.courts.state.ny.us/6jd/forms/dmv/dp-52.pdf). The court may request an investigation from the probation service, and a written report. § 702(3). If a CRD is sought from the Parole Board after service of a prison term, the process may take several months. *See* <http://parole.state.ny.us/ParoleCert.pdf>. Certificate may be temporary during the period of parole, and becomes permanent if not revoked. “In granting or revoking a certificate of relief from disabilities the action of the board of parole shall be by unanimous vote of the members authorized to grant or revoke parole. Such action shall be deemed a judicial function and shall not be reviewable if done according to law.” § 703(5).

The process for seeking a CGC is more or less the same, except that an applicant must satisfy the “good conduct” waiting period specified in § 703-b(3). The waiting period “shall be measured either from the date of the payment of any fine imposed upon him or the suspension of sentence, or from the date of his unrevoked release from custody by parole, commutation or termination of his sentence.” *Id.* The board “shall have power and it shall be its duty to investigate all persons when such application is made and to grant or deny the same within a reasonable time after the making of the application.” Vote by whole board, or of a unanimous three-member panel. § 703-b(1).

*Frequency of Grants:* According to the Division of Criminal Justice Services, an average of 3200 certificates of both kinds are issued each year. (This data is not broken down by type of certificate. However, the Division also reports that between 1972 and 2003 there were almost 100,000 CRDs granted, but only 1826 CGCs.) Approximately 1000 applications are made to the Parole Board for both kinds of certificates annually, of which about half are granted. (About 95% of CGC applications are granted.) The bulk of the remaining grants are made by the courts. A recent report of a New York State Bar Association committee speculated that the relatively low number of certificates issued each year can be attributed by the fact that most offenders are not told about them. *See* “Reentry and Reintegration: The Road to Public Safety: Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings” at 99-106 (May 2006), [http://www.nysba.org/MSTemplate.cfm?Section=Report\\_\\_Re-Entry\\_and\\_Reintegration\\_\\_The\\_Road\\_to\\_Public\\_Safety&Site=Special\\_Committee\\_on\\_Collateral\\_Consequences\\_of\\_Criminal\\_Proceedings&Template=/ContentManagement/HTMLDisplay.cfm&ContentID=74434](http://www.nysba.org/MSTemplate.cfm?Section=Report__Re-Entry_and_Reintegration__The_Road_to_Public_Safety&Site=Special_Committee_on_Collateral_Consequences_of_Criminal_Proceedings&Template=/ContentManagement/HTMLDisplay.cfm&ContentID=74434).

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### **III. Nondiscrimination in Licensing and Employment:**

- NYS Human Rights Law, N.Y. Exec. Law § 296(16), prohibits public and private employers and occupational licensing agencies from denying any individual employment or a license (or otherwise discriminating against that person) because of any arrest that did NOT result in a conviction. (These arrests should be sealed under N.Y. Crim. Proc. Law § 160.50 and viewed as a legal nullity under § 160.60.) These protections do not apply to police or law enforcement jobs. Also, they apply only to applicants for employment, not current employees.
- N.Y. Correct. Law §§ 750-755 make it unlawful for public employers, occupational licensing authorities, and private employers with more than 10 employees, to discriminate against current or potential employees based on a previous conviction. Law enforcement positions are excluded from the definition of “employment” under this section. § 750(5). Employers and licensing agencies may not disqualify people based upon their criminal record unless disqualification is mandated by law, and the person has not received a certificate of relief from disabilities or certificate of good conduct. § 751. They may not “discriminate against” applicants with criminal records 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. § 752.
 The term “direct relationship” is defined as follows: “the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought.”

Section 753(1) provides that in making a determination under § 752 a public agency or private employer “shall consider” the following factors:

- (a) “the public policy of this state . . . to encourage the licensure and employment of all persons previously convicted of one or more criminal offenses;”
- (b) specific duties and responsibilities necessarily related to the license or employment sought;
- (c) the relation of the conviction to the applicant's ability to perform his responsibilities;
- (d) time elapsed since offense;
- (e) age of the person at the time of offense;
- (f) seriousness of the offense;
- (g) any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and
- (h) the interest of the employer of protecting property, and the safety and welfare of individuals or the general public.

Section 753(2) provides that 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.

This provision has been interpreted by the courts to create a presumption of rehabilitation that must be given effect by the employing or licensing agency. *See Bonacorsa v. Lindt*, 71 N.Y. 2d 605, 611 (1988) (Presumption of rehabilitation created by certificate of good conduct applies, even when applicant's prior conviction directly related to license or employment sought; because presumption applies, agency or employer must consider statutory factors to determine whether direct relationship is sufficiently attenuated to warrant issuance of license or employment). *See also Arrocha v. Board of Educ. Of City of New York*, 93 N.Y. 2d 361 (1999) (Board of Education's determination that teaching license applicant's prior conviction for sale of cocaine came within statutory "unreasonable risk" exception to general rule that prior conviction should not place person under disability, was neither arbitrary nor capricious, where Board properly considered all statutory factors and determined that those weighing against granting license outweighed those in favor; age of conviction, applicant's positive references and educational achievements, and presumption of rehabilitation were outweighed by teacher's responsibility as role model and nature and seriousness of applicant's offense.).

If denied employment or licensure based on conviction, an individual is entitled to a statement of reasons. § 754. Section 755 specifies the mode of enforcement (in case of public employer through a civil action, and private employer through division of human rights and commission on human rights).

- Hazmat Drivers Licenses – New York law disqualifies persons from obtaining a Hazmat endorsement to a commercial truckers license who have been convicted of certain felonies within the past ten years, or who have been released from prison within the past ten years. N.Y. Vehicle & Traffic Law § 501(6). This law contains no provision for waiver. It imposes a stricter standard than the federal law (seven and five years waiting period, with a waiver provision).
- Methods of enforcement of the New York nondiscrimination law, and a review of employment discrimination claims filed by convicted persons with New York's Division of Human Rights, can be found at <http://www.altrue.net/altruesite/files/hprp/publications/abell%20final.pdf>, Homeless Persons Representation Project, "Ex-Offenders and Employment: A Review of Maryland's Public Policy and a Look at Other States," December 2001, rev. June 2002).

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\* Certificate of Relief from Disabilities, N.Y. Correct. Law §§ 700-703, or a Certificate of Good Conduct, §§ 703-a, 703-b, may be obtained to restore certain rights, and may be limited to one or more specific rights. *See* discussion in Part II C above.

